82-1199

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1982

No.

FRANK THOMPSON, JR.,

Petitioner

-vs.-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the principle of legislative independence, which inheres in the constitutional doctrine of separation of powers, is violated when agents of the executive branch of government attempt to lure a member of Congress into criminal conduct without basis to believe he is corrupt and without reasonable suspicion of criminal activity within the legislative branch generally.

2. Whether the principle of legislative independence and/or the radiations of the First and Fourth Amendments are violated when undercover agents of the Executive Branch, without cause or reasonable suspicion, lure a member of Congress into a seemingly private setting and surreptitiously videotape confidential discussion of legislative matters, processes and persons.

3. Whether it constitutes outrageous and

overreaching conduct in violation of the Due Process Clause when federal agents

(a) fabricate a criminal enterprise and seek to entice suspicion-free persons into corruption;

(b) delegate selection of targets to largely unsupervised middlemen who are known criminals and have motive to fabricate evidence;

(c) ignore their own rules and guidelines specifically designed to minimize the dangers of violating individual rights; and

(d) lure the unsuspecting target before a hidden video camera where skilled agent-actors exploit his known drinking problem to create an ambiguous and circumstantial filmed record staged to convey an aura of corruption.

4. Whether, contrary to the opinion below, the doctrine of entrapment as enunciated in United States v. Sorrells and

subsequent cases, permits a defendant who fails to assert entrapment as a factual defense at trial to assert it as a legal defense to his conviction.

5. Whether a jury instruction on "credibility" which refers in progressively harsher language to a defendant's "motive for false testimony" and "strong motive to lie," "chills" the right to testify on one's own behalf, and thus denies the right to a fair trial in a federal court.

6. Whether a defendant is denied a fair trial, Due Process of Law, and his right under Brady v. Maryland and United States v. Agurs when, despite a specific discovery request, the prosecutor conceals and a key witness denies that the witness was promised that he would not be indicted.

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OPINIONS BELOW

The opinion of the United Stats Court of Appeals for the Second Circuit, denying Petitioner's Petition for Rehearing on November 17, 1982 is reported at 692 F.2d 860, and is set forth in the Appendix at 1a.

The opinion of the Court of Appeals for the Second Circuit, affirming, on September 3, 1982, the conviction entered in the United States District Court for the Eastern District of New York (George C. Pratt, Judge) of Frank Thompson for violations of 18 U.S.C. §§201(c), 201(g), and 371 is reported at 692 F.2d 823, and is set forth in the Appendix at 4a.

The opinion of the District Court for the Eastern District of New York (George C. Pratt, Judge) denying Petitioner's post-trial due process claims is reported at 527 F. Supp. 1206 (1981), and is set forth in the Appendix at 84a.

The opinion of the Court of Appeals for the Second Circuit denying appellant's pre-trial motion to dismiss the indictment is reported at 642 F.2d 699

(1980), and is set forth in the Appendix at 273a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of conviction entered by the District Court, was entered on September 3, 1982. The order of the Court of Appeals for the Second Circuit denying the Petition for Rehearing was entered on November 17, 1982. This Petition for Certiorari was filed within sixty days of the final order of the Court of Appeals for the Second Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(I).

CONSTITUTIONAL PROVISIONS

This case involves the First, Fourth and Fifth Amendments and Article I, Section 1.

STATEMENT OF THE CASE

This is an ABSCAM case -- but it is different from most other ABSCAM cases in that the defendant former member of Congress denies that he ever succumbed to the FBI's blandishments.[1]

[1]The unique and circumstantial facts of the Thompson case require a fairly detailed statement.

At the time of his downfall at the hands of the Federal Bureau of Investigation and the Brooklyn Strike Force, Frank Thompson had served his country with honor and distinction for nearly 40 years, starting with his commission as an ensign in the Naval Reserve in October 1941; through distinguished naval service in World War II which brought him a Bronze Star, Gold Star, and a Naval Commendation Combat Medal; a return to active Naval duty during the Korean War; 3 terms in the New Jersey Legislature; and 13 terms in the United States House of Representatives, during which time he earned legislative distinction for his efforts on behalf of the arts, education, labor and civil rights.[2]

As ABSCAM impressario, Prosecutor Thomas Puccio, frequently acknowledged to the trial court, there was not the slightest hint during all those years of political activity that Frank Thompson was in one

[2]Frank Thompson's record of public service was set forth by the 8 character witnesses he presented at trial. For example, Former Rep. Father Robert Drinan of Massachusetts called him: "one of the great progressive spirits....totally without blemish" (Tr. at 2093-4). (References to the transcript of proceedings at trial are designated Tr. at ___)

whit corrupt or had ever sought any illegal personal financial gain from his public service.[3] Nevertheless, Prosecutor Puccio and the FBI agreed to permit a known swindler and con artist, Howard Criden,[4] to bring Thompson before hidden ABSCAM cameras where he could be tempted into corruption.

Thompson's involvement with ABSCAM -- the FBI ploy to have agents pose as representatives of fictitious sheiks prepared to invest petro dollars in the U.S. and to offer financial rewards to coopera-

[3]At the post-trial Due-Process hearing, Puccio admitted there was no basis for attempting to seduce Frank Thompson into taking a bribe. Puccio acknowledged: "Other than what had been developed through the ABSCAM tapes that had been made, ... we had nothing else specific on Congressman Thompson." (DP Tr. at 300-1. "DP Tr." refers to post-trial Due Process hearing.) Or, more directly: "There was no non-ABSCAM that pertained to Thompson." (DP Tr. at 301).

[4]Criden had graphically demonstrated his unreliaability and cupidity some months before when he attempted to swindle his purported "Arab" colleagues (who unknown to him were actually FBI agents) out of $50,000 by having his law partner, Ellis Cook, pose as an official of the Immigration Service, Mario Noto, who was to accept a bribe for alleged future services. (Tr. at 1230-1, 1093). Despite this deception, the FBI continued to rely on Criden's representations that certain public officials were corrupt and could be bribed.

tive public officials -- began on October 1, 1979, when the manager of his Lawrenceville, N.J. congressional office informed the Congressman that a constituent named Joseph Silvestri had called for an appointment because "he had some Arab investors interested in investing" in Thompson's district "relative to real estate and other matters." (Tr. at 2275) An appointment was made for October 4, and was noted in Thompson's office calendar. The following notation was added later:

> Mr. Silvestri called again, and this is in regard to some Arabs in the United States loaning money to Americans. He will be there by himself and maybe with their attorney. Arabs are late getting here and are still at the Ritz in New York. (Ex. TI; Tr. at 2280)

At that meeting, Thompson was introduced by Silvestri to Howard Criden, a Philadelphia lawyer who explained to Thompson that his Arab clients had in excess of $200 million deposited in the Chase Manhattan Bank and were prepared to invest large sums in Thompson's economically depressed 4th District

"principally in real estate and possibly in certificates of deposit." (Tr. at 2283) Although that was the first time Criden and Thompson had ever met, Criden had announced to the fake Arabs a week earlier he had Thompson "all lined up." (Ex. 1A at 1,3)[5]

Following the meeting, Thompson called Philadelphia Judge James Crumlish, with whom Thompson had served in the Navy and whom Criden mentioned as an acquaintance. Judge Crumlish confirmed that Criden was a former member of the Philadelphia District Attorney's office and that his reputation was "good." (Tr. at 2290-1)

The First October 9 Meeting

On October 9, Criden picked up Thompson at his Capitol Hill office and drove him to a noon meeting with the representatives of the "Arabs" at a townhouse on W Street in Washington. Explaining how he got Thompsom to come to the house, Criden later told

[5]Exhibit 1A-37A are transcripts of various video and/or audio tape recordings. Ex. 1A is the transcript of a telephone conversation between Criden and FBI Middleman Melvin Weinberg, a convicted swindler who devised the ABSCAM scenario for the FBI in an effort to avoid imprisonment on unrelated convictions.

Weinberg and FBI agent Anthony Amoroso -- who Criden knew only as "Tony De Vito" -- that he had used "the certificates of deposit and shit like that" as a "come-on." (Ex. 7A2) The meeting took place in front of the FBI's hidden cameras.[6] As all the tapes open, Agent Amoroso was counting out $50,000 in $100 bills into a briefcase. He comments to the camera (and some future jury) that the money was for Frank Thompson, Jr. (Ex. 7A1 at 1) Thompson then enters with Criden, who introduces him to DeVito (Agent Amoroso) and sting-man Weinberg. After several drinks and desultory conversation about wines and the price of real estate, Weinberg turns the conversation to the sheiks and possible future immigration problems. The following exchange then takes place:

Amoroso/DeVito: Can this be

[6]Petitioner beseeches the Court to view all of the October 9 videotapes in order to get a true picture of ABSCAM as it relates to Frank Thomspon. The Court of Appeals viewed none of the three videotapes prior to decision. It finally viewed the final October 9 segment after defendant filed a Petition for Rehearing. (283a) ("a" refers to the Appendix to this Petition.) Petitioner has certified the five October 9 videotapes (Ex. 7) for immediate transmittal to the Court pursuant to Rule 19.1.

> stalled for an extended period of time, and then what to do while the bill is, while the bill is.
>
> Frank Thompson: Well, it can be stalled, but it's very difficult, very difficult.
>
> Amoroso/DeVito: Well, that's what the money is for, is to, is to, you know, keeping this thing going.
>
> Frank Thompson: Well, I'm not looking for any money, and uh ... It depends on the circumstances. I mean if the person is clean, not a Communist and not a known criminal and ... (Ex. 7A1 at 13) (emphasis added)

After further discussion about the intricacies of the immigration laws, Frank Thompson picked up the phone, called his office, and discussed the matter with Jane Butterfield, his immigration specialist. (Ex. 7A1 at 14-16) He asked her to put a memo on his desk, which, according to office practice, meant to check it out with the Immigration and Naturalization Service. (Tr. at 2213)[7]

The conversation turned to the possibility of

[7]This is hardly the action of a criminal conspirator.

investments, particularly Certificates of Deposit in three small independent Trenton banks, and Weinberg assured Thompsor there was no problem:

> You got to remember he's got approximately four hundred million or more. He keeps that in this country at all times. All right?

Weinberg then turned the conversation back once more to the immigration problem:

> So, what there has to be done is, is there has to be a bill presented by some politician to put into Congress for him to stay here as a political refugee... What I'm asking you actually in plain English is that he could depend upon you to try to help him. (Ex. 7A1 at 17) (emphasis supplied)

Thompson gave this conditional response:

> On the basis of this conversation, I'll say to you, I'll be glad to help if I can, but you must understand the limitations of our law and the complications that there are in it. What I say to you is, if your client needs help, uh, meets the standard requirements that that client will get the help and get it speedily and efficiently. (Ex. 7A1 at 28)

At the close of the meeting Amoroso/DeVito told Criden he wanted to talk to him after he dropped Thompson back at the Capitol.

Criden's Meeting With Weinberg and Amoroso

When Criden returned to the W Street house after taking Thompson back to the Capitol, Agent Amoroso expressed great discomfort over Thompson's refusal to accept money:

> I'm uncomfortable ... we dealt with two other guys[8] ... we did business, everything was fine... but the guy says to me he don't want anything, alright. Later on he started mentioning about us putting money in banks down there... now that could of been what he wanted. (Ex. 7A2 at 1-2)

Amoroso then told Criden 27 additional times he distrusted what had occurred. He accused Criden of trying to "rip him off," and accused him "of not telling Thompson what the facts were." (Tr. at 953) Finally, Amoroso tells Criden to "call him up and scratch him." (Ex. 7A2 at 10) Shortly thereafter

[8]Presumably ABSCAM defendants Myers and Lederer.

the phone rang (Ex. 7A2 at 13), and Amoroso thereafter changed his tune.[9] He agreed that Thompson need not accept the cash, nor even verbally acknowledge receipt of the cash. Weinberg then summed up the new ground rules: "Let's get the rules straight now. We agreed that you come here, nothing be said, just hand him the valise." (Ex. 7A2 at 30) Criden emphasized: "No conversation except that here's some documents or shit like that." (Ex. 7A2 at 32-33)[10] In case Criden couldn't convince Thompson to follow the new script, the old pro Weinberg had some sage advice:

> [T]he shittin' guy's a boozer.
> (Ex. 7A2 at 37)
>
> *******
>
> Give him another drink...

[9]Amoroso frequently received instructions in this manner from Justice Department officials who monitored these meetings via closed-circuit television.

[10]The arrangement is directly contrary to the Department of Justice guidelines for this type of entrapment situation. The guidelines require that the bribe be up front, that the cash be delivered directly and by hand and the quid pro quo be spelled out in plain English. (DP Ex. 110 at 138; DP Tr. at 448-52)

(Ex. 7A2 at 40)[11]

The final meeting on October 9

Criden went back to the Capitol, located Congressman Thompson, and told him several things. First, he told Thompson that the Arabs were ready to invest in Certificates of Deposit, and they wanted the names of the local Trenton banks. Thompson wrote out the names of the three banks on a card, and handed it to Criden. Second, Criden warned that the Arabs were distressed when Thompson had let it be known that the Sheik might need political asylum. This was meant to be a deep secret.[12] Third, Criden said he could drive Thompson home that night (Thompson did nct have his car) and stop off at W Street to deliver the information concerning the Butterfield immigration memorandum. (Tr. at 2318;

[11]Although there are frequent references in the tapes to Thompson's perceived drinking problem, (e.g.: Ex. 7A2 at 34, where Thompson is referred to as an "alky"), the videotapes show Amoroso and Weinberg providing him at least 3 drinks during the 60 minutes Thompson spent with them on October 9).

[12]This can easily explain why Thompson was so ready to concur in the need for caution at the final meeting -- a fact which the Court of Appeals found highly incriminatory. (22a, 80a)

Ex. TC) He also said they might pick up some business papers.

The tapes show what happened next. It opens with Agent Amoroso again stuffing $50,000 in one hundred dollar bills into a briefcase. (Ex. 7A5 at 1.)

Thompson and Criden arrived at 7 p.m. and stayed for about 15 minutes. As soon as they arrived, Criden took the briefcase from the nightstand and put it on the floor in front of Thompson. Criden said, enigmatically: "Frank understands the situation." Amoroso/DeVito replied: "I just want to make sure that, you know, you understand. There's the briefcase." (Ex. 7A5 at 1) At this point, both Thompson and Criden reached for the briefcase. Thompson quickly relinquished it to Criden, and said "Look at that for me, will you."[13]

---

[13]This statement has taken on extraordinary significance in this case. The prosecution, in what can only be described as a case of pure wishful thinking, has consistently translated those words as "Look after that for me will you" (7A5 at 2), words indicating that Thompson was aware there was money in the briefcase. Indeed, the Court of Appeals was so impressed with that alleged statement, it quoted it at three separate and unrelated parts of its opinion to demonstrate that the evidence against Thompson was clear and that his due process rights were scrupu-

There was then a discussion based on the immigration report prepared by Jane Butterfield (Ex. 7A5 at 4-5), and a discussion about investments in the Trenton Banks and in Trenton real estate developments. Finally Amoroso/DeVito suggested that Criden might be "good for a $10,000 campaign contributon." Thompson replied: "No, no." (Ex. 7A5 at 11) Thompson continued: "I wouldn't take a ten thousand...." At this point Criden laughed, and Amoroso/DeVito changed the subject to Certificates of Deposit and real estate investments. (Ex. 7A5 at 12-13)[14] The meeting ended, and Criden drove Thompson

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tously protected. (See 22a, 47a, and 80a) In his Petition for Rehearing, defendant pointed out the inaccuracy of the quote, urged the Court to at least view and listen to the tapes of October 9 and submitted an affidavit from an audio engineer stating that the video tape "clearly states 'you look at that for me, will you'" (326a), words consistent with Thompson's claim that he thought the case contained business documents. The Court then viewed the final October 9 tape and astoundingly concluded that "After viewing and hearing the videotape, we cannot be certain whether the disputed word was 'at' or 'after'." (2a) Then, ignoring the heavy emphasis it had placed upon that sentence in its first opinion, the Court of Appeals announced that it really made no difference which version was correct. Id.

[14]In connection with Thompson's claim that he met with Criden, Amoroso and Weinberg to obtain new business for Trenton, the record reflects continuing

to his home in Alexandria, Virginia.[15]

The Indictment and Conviction

None of the foregoing constitutes the substantive offenses for which the defendant was indicted, but it was the evidence relied on by the prosecution as proof of Thompson's participation in a bribery conspiracy. Frank Thompson was actually indicted for a connected series of offenses growing out of the alleged passage of a briefcase filled with money to Criden in the presence of Representative John Murphy at a Kennedy Airport motel on October 20, 11 days after the meeting at the townhouse in Georgetown.[16]

efforts in this regard. Tr. at 2520, 1249, 1639-43, 1327, 1389, 1390.

[15]Criden later told his partner, Ellis Cook, that he had passed Thompson $20,000 in $100 bills in the back of the rented limousine (Tr. at 1246), but the chauffeur hired for the occasion did not see or hear any such thing. (Tr. at 1536, 1549) The indictment does not charge a bribe was given at this time; it charges a bribe payment was made to Thompson several weeks later at a restaurant in New Jersey.

[16]Former Congressman Murphy stood trial with Thompson and is filing a Petition for Certiorari contemporaneous with Thompson's. Rather than devote precious space to the October 20 meeting at Kennedy Airport, Petitioner will assume that the Murphy petition will set forth the events that transpired there, none of which further incriminated Thompson.

The government's evidence came from Ellis Cook, who testified under immunity that his partner Criden had told him that he gave $25,000 of the money on October 22 to Thompson to share with Murphy. In addition, Rep. John Murtha of Pennsylvania, who falsely denied that he had been promised immunity for his own ABSCAM role,[17] testified that Thompson spoke to him on the House floor about some rich Arabs who had money to invest in their districts and that "there would also be some walking around money available" for cooperative Congressmen in the amount of $50,000.

Based on the above testimony, a jury found Petitioner guilty of bribery (18 USC 201)(c), conflict of interest (18 USC 201(g), and conspiracy (18 USC 371). He was acquitted of accepting an illegal gratuity (18 USC 203(a). The trial judge dismissed a count under the Travel Act (18 USC 1952).

[17] It was only subsequent to trial that defendant discovered that Murtha had in fact been assured by the prosecution that he would not be indicted. The failure of the prosecution to correct Murtha's false testimony has been consistently cited by defendant as a violation of Brady v. Maryland, 373 U.S. 83. See pages 62-65, infra.

Subsequent to the jury verdict, the trial court conducted a lengthy combined hearing into the claims of a number of ABSCAM defendants that their indictments and conviction violated Due Process. All of those motions were denied. (84a)

The trial judge deferred sentencing of Thompson pending a post-appeal review of his medical situation and temporarily imposed a statutory sentence under 18 USC 4205(c).

The Motion for a New Trial

After defendant filed Notice of Appeal, information began to be revealed from various sources (including Weinberg's former wife) that Melvin Weinberg had caused at least one other ABSCAM target, a former member of the New Jersey Casino Control Commission, Kenneth MacDonald, to be falsely accused of accepting a bribe while Weinberg himself pocketed the "bribe" money. The new evidence is now the basis of a motion by defendant Thompson for a new trial which was denied by the trial court and is pending appeal in the Second Circuit. (Docket No.

82-1271)[18]

REASONS FOR GRANTING THE WRIT

This petition poses issues of extraordinary significance to the future of law-enforcement in this country as well as to the future of our constitutional structure. The trial judge wrote that from the very beginning of ABSCAM:

> [I]t was apparent that these were significant cases to the defendants, to the FBI, to the Justice Department, to the public, and perhaps even to the very structure of our governmental system.... The integrity of both the FBI and the Justice Department has been vigorously challenged. A novel investigative technique has been employed against members of Congress and others without specific suspicions. And the entire matter had been given extensive national coverage in the news media, reflecting not only the importance of the criminal actions, but fundamental political and constitutional issues in which many

[18]It is defendant Thompson's position that the prosecution was aware all along of Weinberg's double-dealing with MacDonald but concealed that information despite specific discovery requests. Since Thompson claims that he was similarly victimized, he contends that he should have been permitted to present to the jury the evidence of how Mel Weinberg had victimized Mr. MacDonald.

Defendant suggests to the Court that it might wish to defer action on this Petition pending disposition of the new trial appeal. If affirmed, that matter might appropriately be merged with this one.

segments of the population had an interest. (115-6a)

ABSCAM is sui generis. Little in our jurisprudence precisely prepares us for the issues it presents -- especially as they are framed by the conviction of former Congressman Frank Thompson, Jr., a much honored public servant who had never been tainted with the hint of corruption during a long and distinguished military and political career until he was lured before the secret cameras of ABSCAM.

As a test of our criminal jurisprudence, the outcome of this case will decide whether law enforcement in this country is to be transformed from a system of prevention and detection to one of creation and inducement.

Equally far-reaching is the potential impact of this case upon the political and legislative process and upon fundamental rights of privacy of all Americans. As the Court of Appeals observed in regard to ABSCAM:

> The Executive Branch of the government of the United States

> has carried out a plan to determine whether members of the Legislative Branch and others would commit bribery offenses if presented with the opportunity to do so. In a constitutional democracy this maneuver inevitably raises sensitive issues of public policy and public law. (251a)[19]

Other sensitive issues of law and public policy are raised by the use of hidden cameras to surreptitiously film private conversations of individuals about whom there was no suspicion of corruption or reason to believe they were criminally inclined. This Court has never addressed the issue of unconsented videotaping of private individuals by law-enforcement agents, let alone the question of the propriety of luring a member of a coordinate branch of government before those cameras on the pretext of discussing legitimate legislative business.

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[19]United States v. Myers, 635 F.2d 932, 934 (1980), cert. den. 449 U.S. 956 (1980) (hereinafter referred to as Myers I). This was the pre-trial, interlocutory appeal by one of the ABSCAM defendants tried in the Eastern District of New York. (Included in the Appendix beginning at 250a)

I. THE AUTHORITY OF GOVERNMENT AGENTS, IN THE ABSENCE OF EITHER INDIVIDUALIZED SUSPICION OR CAUSE TO BELIEVE ANY LAW HAS BEEN VIOLATED, TO LURE A MEMBER OF CONGRESS BEFORE A HIDDEN CAMERA TO TEMPT HIM INTO CORRUPTION AND USE THE RESULTING VIDEOTAPE AS THE BASIS FOR A CRIMINAL PROSECUTION, PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NEVER BEEN DECIDED BY THIS COURT

As set forth earlier, Congressman Thompson, a man of impeccable reputation, was lured to the W Street townhouse solely on the representation of a known swindler and confidence man, Howard Criden, that Thompson could be corrupted.[20] Criden was

[20]The FBI's sting-man, Mel Weinberg, Launched Criden on his hunt for political big-game with the following words of encouragement:

> Mel Weinberg (MW): Now, who else we got lined up?
>
> Howard Criden (HC): Well, we can get anybody you want, any one. Within reason I can produce almost anybody you want.
>
> MW: ... OK now the only other thing I want to ask you is how about some Republicans? Doesn't it look bad it's all Democrats?
>
> HC: Alright I'll try ... I'll go to work on that today to try to get you some ... Would you like some governors?
>
> MW: Yeah why not.

allowed to bait his ABSCAM hook with promises of economic relief for Thompson's depressed Congressional district. Indeed, it would have bordered on neglect of fiduciary responsibility to his constitutents for Thompson to have out-of-hand rejected Criden's offer of millions of dollars available for job-producing investments in the Trenton, N.J. area.

Having lured the unsuspecting Congressman to an apparently private meeting with the promise of aid for his distressed district, the Executive Branch's agents proceeded to ingratiate themselves into his confidence, displaying a false air of comraderie while plying him with liquor.[21] All the while, of

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HC: Congressmen, Senators, Governors, what else?

MW: Any guy in Washington (IA) and they're happy as a lark ... (Ex. MC at 1-2)

[21]See fn. 11, supra. Howard Criden later testified before the Senate Select Committee on ABSCAM that Thompson "after drinking rather heavily all afternoon ... was pretty well shot by the time we came back for the second meeting." (Criden Testimony at 95) (The Criden Senate testimony is included in the appendix to John Murphy's motion for a new trial filed Dec. 14, 1982 in the Eastern District of New York, Docket No. 80 CR 00291)

course, the Executive Branch's cameras were grinding away, recording for posterity any lewd, obscene or impolitic comment or gesture made by the Congressman in this apparently private and confidential atmosphere.

During the course of some 60 minutes of candid and unguarded conversation, the agents succeeded in goading Thompson to belittle and ridicule several of his Congressional colleagues (Ex. 7A1 at 7-8, 11-12); brag about his power and influence in Congress and New Jersey politics (Ex. 7A1 at 6-7; 7A5 at 8-9); and generally comport himself in locker-room fashion. Anyone watching the October 9 tapes will quickly recognize that whether or not Frank Thompson had done anything remotely incriminating in front of that hidden camera, those tawdry tapes would be a powerful weapon in the hands of any political opponent.[22]

The Court of Appeals, however, could find no

[22]Recent history reminds us that one former FBI Director maintained sensitive materials in a private "Do Not File" file in his private office. See Final Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Congress, 2d. Session, Book III at 358 (1976).

constitutional violation in the behavior of the agents of the Executive Branch. It dispatched defendant's claims of violation of legislative independence and the doctrine of separation of powers with the assertion that "the Constitution does not provide Members of the Legislative Branch with any extra protections beyond that guaranteed to all citizens" with the exception of Section 6, Article I, the Speech or Debate Clause, which defendant conceded was not directly applicable to the issue. (28a) Defendant's objection to surreptitious videotaping in the absence of either judicial warrant or reasonable suspicion was summarily rejected with a reference to United States v. White, 401 U.S. 745 (1971) and Lopez v. United States, 373 U.S. 427 (1963).[23] (82a)

[23]The Court below also erroneously suggested that defendant had waived objection to the videotapes by failure to submit a timely motion to suppress their use at trial. (82a) In his Petition for Rehearing, defendant pointed out that he had indeed asserted in his pretrial motion to dismiss the indictment that: "Alternatively, the evidentiary fruits of these activities, including the videotapes ... should be suppressed." (At p. 22, n.12) The Court of Appeals failed to respond to this point in its denial of the Petition for Rehearing. (1a)

A. The Holding of the Court of Appeals, That Aside From Art. I, Sec. 6, the Constitution Provides No Protection Against Executive Encroachments Upon Legislative Independence, Threatens Fundamental Principles of Separation of Powers Which Are the Bedrock of Our Political Democracy

There is nothing arcane or academic in the concept that ours is a government of Separation of Powers with appropriate and strong checks and balances. Northern Pipeline Const. v. Marathon Pipeline Co. ____ U.S. ____, 102 S.Ct. 2858, 2864 (1981); United States v. Will, 449 U.S. 200, 101 S.Ct. 471, 482 (1980). See also Immigration and Naturalization Service v. Chadda, No. 80-1832, reargued before this Court, 51 U.S.L.W. 3453 (Dec. 14, 1982). And as this Court noted in United States v. Nixon, certain rights and privileges "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. 683, 705 (1974)

It is true that this Court has held that the Speech or Debate Clause, Art. I, Sec. 6, does not immunize members of Congress from prosecution under bribery statutes, United States v. Brewster, 408 U.S.

501 (1972), and petitioner makes no claim to any general immunity. It is his contention, however, that the principle of Separation of Powers, of which the Speech or Debate Clause is but "one manifestation... for ensuring the independence of the legislature," United States v. Johnson, 383 U.S. 169, 179 (1966) should be held to preclude the arbitrary targeting of members of Congress as the unwitting subjects of Executive Branch experimentation in the corruptibility of public officials. As this Court only recently repeated, the checks and balances built into the tripartite Federal Government were regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Northern Pipline, supra, 102 S.Ct. at 2864, quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

The Separation of Powers principle was described by James Madison in the Federalist Papers as one requiring that none of the branches "possess, directly or indirectly, an overruling influence over

the others in the administration of their respective powers." (Federalist Papers, No. 48, quoted in United States v. Johnson, supra, 383 U.S. at 178-9.) This point was expanded by Thomas Jefferson, who wrote that "it was part of the common law, adopted as law of this land, that [the people's] Representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." 8 The Works of Thomas Jefferson 322 (Ford. Ed. 1904).

Preservation of that principle, Mr. Justice Jackson reminded us in the Steel Seizure Cases, requires constant vigilance, because the inherent power and prestige of the Presidency "exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness." Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 653-4 (1952). (concurring opinion)

Commitment of the law enforcement and prosecutorial functions in the Executive made it necessary to surround members of the legislative branch with

protections against the misuse of those functions. The Speech or Debate Clause is one of those shields which "prevent intimidation by the executive and accountability before a possibly hostile judiciary." United States v. Johnson, supra, 383 U.S. at 180-1.[24] But the Speech or Debate Clause has a narrowly restricted scope, and this Court has not hesitated to rely on the very structure of our government, as designed by the Framers, to invalidate other Executive attempts to overreach the legislative branch. See, e.g., Youngstown Sheet & Tube v. Sawyer, supra. In the final analysis, Mr. Justice Jackson observed in Youngstown, "men have discovered no technique for preserving free government except that the Executive be under the law." 343 U.S. at 655. Enforcement of that command is the special province of the judicial branch, which is why this Court must now determine the legal limits of Executive intrusion into the

[24]When the ABSCAM prosecutors developed the "asylum scenario," they necessarily focused on members of Congress (DP Tr. at 1421), in whom the Constitution lodges authority over matters of immigration and naturalization. That focus was adopted despite the absence of evidence of actual corruption involving immigration legislation.

legislative domain when the legislators themselves have not provoked Executive action by prior violations of normative rules which the Executive is empowered to enforce.

As Mr. Chief Justice Burger has more recently reminded us, the main inspiration for the long struggle for legislative independence, both in this country and in England, has been the fear of "the instigation of criminal charges against critical or disfavored legislators by the Executive..." United States v. Helstoski, 442 U.S. 477, 491-2 (1979), quoting from United States v. Johnson, supra, 383 U.S. at 182. Even "the mere threat of an indictment is enough to intimidate the average Congressman and jeopardize his independence." Id. at 205. The danger that disfavored legislators will become the targets of prosecution by the Executive is greatly enhanced when the allegedly illegal conduct that is made the subject of prosecution is entirely the product of government inducement. For in such a

situation there is no natural check on the selection of targets[25] or on overzealous efforts to generate a prosecution.

Further compounding the problems inherent in the application of bribery "stings" to the conduct of elected officials is their dependence on the campaign contributions of constituent groups. As Mr. Justice White has noted, "[m]utuality of support between legislator and constituent is inevitable.... It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported or will support, by speech making, voting, or bargaining with fellow legislators." United States v. Brewster, 408 U.S. at 558 (dissenting opinion). This provides, as Mr. Justice White further noted, wide "scope for an Executive prone to fish in legislative waters ... The possibi-

[25]Judge Fullam, who presided at the Philadelphia trial, observed that Mel Weinberg was "strongly motivated to produce results for his FBI employers." United States v. Jannotti, 501 F. Supp. 1182, 1193 (1980), reversed 673 F.2d 578 (3d Cir., 1982), cert. denied, ____ U.S. ____, 102 S.Ct. 2906 (1982). Weinberg also indicated a desire to even up the score by producing "some Republicans." (Ex. MC at 1-2)

lities are indeed endless, as is the potential for abuse." 408 U.S. at 560.

Robert Stewart, the Attorney in Charge of the Justice Department's Newark Strike Force, commented on this problem in an early ABSCAM memo. In his judgment, ABSCAM posed dangers not present in more traditional sting operations involving contraband, where the illegality of the transaction involved is unmistakable from the outset. According to Stewart:

> In the present investigation, the circumstances are fundamentally different because there is nothing inherently illegal about either the nature of the meeting place or the general topic of conversation. Indeed, absent specific facts to the contrary, there is an initial presumption of legality because of the positions which the suspects occupy and because of the ostensibly legitimate nature of the things under discussion--whether those things be the operation of a business, economic development in a particular area, or the protection of the human rights and indeed the very life of a foreign national who is touted as nothing more than a legitimate entrepreneur. Hence, the decision for further investigative action cannot be controlled by the criteria which govern such decisions in a conventional "sting" operation,

> but must depend instead upon the demonstrable existence of special facts which infect the particular transaction with illegality. (DP Ex. 15 at 4)

To prevent the improper targeting of non-predisposed defendants, Prosecutor Stewart thought it necessary to develop an independent basis on which to assess each individual's willingness to engage in criminal activity. Id. That was not done here. The government relied completely and uncritically on Howard Criden's representations as to Thompson's corrupt intentions--despite the fact that Criden had previously demonstrated his unreliability in a variety of contexts.[26]

Police discretion to single out targets for surveillance and/or prosecution is intolerable under any circumstances because of the "grave danger" of abuse, Delaware v. Prouse, 440 U.S. 648, 662 (1979), holding that highway police may not arbitrarily choose which motorists to investigate absent reasonable cause to

[26] See Statement of the Case. Moreover, executive branch agents persisted in their efforts to compromise Thompson even after he had rejected their initial offers of a bribe (Ex. 7A1 at 13) and even though Agent Amoroso remained unpersuaded that Thompson had any intention of succumbing to their corrupt offers. (Ex. 7A2)

select one rather than another. And OSHA inspectors may not arbitrarily choose which business to target for safety inspection. Marshall v. Barlow's, 436 U.S. 307 (1978). Otherwise, individuals would be subjected to the whim and caprice of prosecuting officials. See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy statute), and Grayned v. City of Rockford, 408 U.S. 104 (1972) (picketing regulation).

In each of the above-cited cases, this Court was concerned with the dangers of arbitrary and discriminatory enforcement inherent in any scheme which lacked objective standards limiting the discretion of the public officials responsible for enforcing the law. In none of those cases did the Court assign to the defendant the nigh impossible task of demonstrating that the government had actually abused its discretion in selecting him as the target for prosecution or investigation. Instead, the Court insisted on the observance of objective standards to

justify governmental intrusion on the individual's privacy and security.[27] Certainly, the need for restraint on arbitrary action is far more compelling here, where the instrusion involves the marshalling of sophisticated and powerful manipulative techniques to entice members of a coordinate branch of government into criminal activity.

Since it is unquestioned that at the time former Congressman Thompson was subjected to inducement to commit federal crimes the government had absolutely no basis for suspecting that he had ever conducted his legislative affairs in a corrupt or illegal manner,[28] this case presents the appropriate vehicle for determining the scope of FBI authority to tempt

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[27]While the Senate Select Committee concluded that ABSCAM itself did not encroach upon legislative independence or endanger "the constitutonally mandated separation of powers," it did assert that "Secret police powers exercised honorably by today's high-minded officials can readily be tomorrow's abuses in the hand of less scrupulous administrators." (Final Report, "Summary of Recommendations," at 70.)

[28]As the trial court noted, there was no evidence of any prior activity on the part of any of the defendants, including Thompson, that "would warrant suspicions of criminality in the conduct of their legislative affairs." (148a)

legislators into corruption.

B. The Surreptitious Videotaping of a Congressman's Conversation, in the Absence of a Warrant or Reasonable Suspicion to Believe a Crime Had Been Or Was About to be Committed, Jeopardizes Rights of Privacy Protected by the Conjunction of the First & Fourth Amendments as Well as the Principle of Legislative Independence

The Court of Appeals mechanically applied this Court's holdings in White, supra, and Lopez, supra, in concluding that "mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence." (81-2a) In so doing, the Court failed to consider (1) the fact that in both White and Lopez the police had probable cause to believe the targets of the surveillance were involved in commission of a crime; (2) the substantial differences between audio and videotaping and the impact on society of unrestricted police use of hidden cameras; or (3) the impact of such methods upon the political process when employed against a member of the legislative branch.

In both Lopez and White, government agents had

implanted either a recorder or a transmitter on an informer involved with the defendant in an illegal transaction.[29] In each case, this Court held there was no constitutional infirmity in using a device that could corroborate the informant's testimony about the transaction. Both Lopez and White were suspects in ongoing criminal investigations against whom there was substantial probable cause to believe they were about to commit a crime.[30] The only substantial constitutional issue involved was whether, despite probable cause, such surveillance required advance judicial approval in the form of a warrant.

In sharp contrast, the FBI had neither a warrant nor probable cause to target Frank Thompson. Thus, this case presents the issue of electronic sur-

[29] In Lopez, the informant recorded the conversation on a tape recorder concealed on his body. In White, the radio transmitted the conversation to agents who were monitoring the frequency.

[30] Lopez was an innkeeper who had previously offered the wired Internal Revenue agent a bribe to minimize his tax liability. 373 U.S. at 430. White was a narcotics dealer who had previously engaged in illegal transactions with the bugged informant. 401 U.S. at 745.

veillance in a context not contemplated by this Court in either Lopez or White.

If, in fact, law enforcement agencies have carte blanche to electronically monitor the conversations of Americans, elected officials or not, whenever there is other-party consent, the implications for our notions of privacy and liberty are far-reaching. Even in the far less threatening circumstances of Lopez, Mr. Justice Brennan's dissent warned of the deliterious social consequences of assigning such powers to police agencies: "Electronic surveillance, in fact, makes the police omniscient, and police omniscience is one of the most effective tools of tyranny." 373 U.S. at 466. In addition to the dangers such surveillance posed to the rights of privacy and liberty guarded by the Fourth and Fifth Amendments, Justice Brennan also warned of its capacity to stifle free communication and discourse guarded by the First Amendment: "Electronic surveillance destroys all anonymity and all privacy;

it makes government privy to everything that goes on." Id. at 471. Twenty years before ABSCAM, Justice Brennan added these prophetic words:

> I cannot but believe that if we continue to condone electronic surveillance by federal agents by permitting the fruits to be used in evidence in the federal courts, we shall be contributing to a climate of official lawlessness and conceding the helplessness of the Constitution and this Court to protect rights 'fundamental to a free society.' (Id. at 470)

Several years later, Mr. Justice Harlan, the author of the Lopez majority opinion, echoed the Brennan dissent when police monitors were permitted to tune in on the bugged conversation in the White case. Calling for judicial supervision of such practices, Mr. Justice Harlan wrote that "were third-party bugging a prevalent practice, it might well smother that spontaneity... that liberates daily life." Id. at 787. Without a warrant procedure, he warned, "every law-abiding member of society is at risk." Id. at 789.

Growing judicial concerns over the consequences

of a "bugged" society were noted by Professor George Dix of the University of Texas Law School in "Undercover Investigations and Police Rulemaking," 53 Tex. L. Rev. 203 (1975). Warning of the threat to privacy interests when police use electronic surveillance techniques, Professor Dix noted "the effect may be indirect. Each person not themselves the subject of such investigations may be affected by awareness that such investigations occur and the possibility that they may be subjected to one." Id. at 211-12. Professor Dix emphasized that "especially important activities," such as the free exchange of ideas, will be undermined by "actual or anticipated undercover investigations." Id. at 212.

A similar theme was sounded by this Court in a unanimous opinion in United States v. United States District Court, 407 U.S. 297 (1972) holding unconstitutional so-called "domestic security" wiretaps in the absence of a warrant. There, the Court warned that "Fourth Amendment protections become the more necessary when the targets of official surveillance

may be those suspected of unorthodoxy in their political beliefs," because "[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power." Id. at 314

Analogous issues are raised by this case. In District Court, this Court forbade the electronic surveillance of political dissidents without a warrant based on probable cause because of the pall that would be cast over the right of dissent if government agents were allowed to exercise such power in the name of "so vague a concept as the power to protect 'domestic security.'" Id. at 314 In this case, the Court should consider the scope of FBI power to secretly videotape Frank Thompson under the equally vague rubric of ferreting out official corruption, because of the impact such power in the hands of the executive branch would have upon the political independence of members of the legislative branch. This case, like District Court, involves a "convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime." Id. at 313.

The threat posed grows increasingly ominous as science furnishes police agencies with ever more sophisticated and intrusive means of surveillance.[31] See generally A. Westin, Privacy and Freedom (1967). Electronic audio bugging intrudes upon the privacy of an individual's spoken word; videotaping goes substantially further by seizing the visual manifestations of an individual's actions as well as aural impressions. Recent sociological and psychological studies have examined the impact on behavior of overt videotaping. It is obviously much more dif-

[31] A half century ago, in Olmstead v. United States, 277 U.S. 438, 474 (1928), Mr. Justice Brandeis predicted:

> Ways may some day be developed by which the Government without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrence of the home ... Can it be that the Constitution affords no protection against such invasions of individual security?

Much later, the Court in Silverman v. United States, 365 U.S. 505, 509 (1961), warned of "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society." A few years later Justice Douglas warned that "we are rapidly entering the age of no privacy, where everyone is open to surveillance at all times." Osborn v. United States, 323 U.S. 322, 341 (1966).

ficult to test the impact on behavior of covert videotaping once it is socially recognized that such surveillance is permissible. Ironically, other government agencies have apparently acknowledged the dangers of surreptitious videotaping and have adopted strict guidelines forbidding its use in funded research. See Weimann, "Effects of Laboratory Videotaping Procedures on Selected Conversation Behaviors," 7 Human Communications Research 302 (1981).

But surely the most vivid description of the impact of the ubiquitous video-camera on human behavior comes not from social science, but from literature. It is from George Orwell's classic novel of life in the fictional Oceania, which, appropriately, takes place in the year "1984":

> There was, of course, no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire, was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they

> wanted to. You had to live--did live, from habit that became instinct--in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.
> [George Orwell, 1984]

This case presents this Court an opportunity to consider just how far this society shall be permitted to proceed down that chilling path. If the FBI could film the meetings of Frank Thompson at the house on W Street, then why could they not do the same after luring him to a barroom or an illicit bedroom--possibly on a theory of ferreting out Congressmen who might be subject to sexual blackmail? If they can do it to a Congressman who has legislative jurisdiction over the FBI why not to a judge before whom their prosecutions are to be tried?

In United States v. Nixon, 418 U.S. 683 (1974) and Nixon v. Administrator of General Services, 433 U.S. 425 (1977), this Court recognized a qualified privilege of confidentiality in Executive conversations which can be breached only for the weightiest

of reasons. The same identical considerations apply at both ends of Pennsylvania Avenue. Congressmen, too, and those who assist them, like the President and his advisors "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.... The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708.

The Court again emphasized that the confidentiality of Presidential communications rests not on any specific clause of the Constitution, rather "the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. at 705. Certainly the doings of Congressmen acting in their assigned area of constitutional duties warrant and need the same degree of constitutional protection.

II. THIS COURT MUST PROVIDE GUIDELINES TO THOSE WHO ENFORCE AND ADMINISTER OUR CRIMINAL JUSTICE SYSTEM AS TO THE DUE PROCESS RESTRAINTS UPON GOVERNMENT AGENTS IN THE INDUCEMENT OF AND PARTICIPATION IN CRIMINAL ENTERPRISE

Since its decision in Sorrells v. United States, 287 U.S. 435 (1932), a half century ago, this Court has attempted periodically to define the outer limits of government participation in criminal acivity in an effort to apprehend law-breakers. In the Court's most recent endeavor, an opinion which apparently reflected the least common denominator of a then majority merely acknowledged that government action might at some point reach a "demonstrable level of outrageousness" that would violate Due Process and bar the prosecution from obtaining a conviction of the accused. Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring.) Petitioner suggests this is the appropriate case for the Court to articulate the appropriate Due Process standards and/or to define the reach of its own supervisory powers in controlling official law-breaking.[32]

[32]Since Petitioner assumes that other ABSCAM defendants will devote substantial parts of their petitions to this issue, and in view of space

The absence of meaningful standards has provoked an enormous amount of critical legal commentary and has created confusion and conflict in the lower federal courts, as the disparate treatment of ABSCAM prosecutions graphically demonstrate. Two of the three District Court Judges who have thus far heard these cases have found that the government's conduct went beyond the Due Process pale. Judge Fullam found that the "techniques employed" by the FBI "went far

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constraints, we will severely limit our argument on this important point.

In view of space limitations, Petitioner will also omit argument concerning the lower courts' refusal to allow him to seek acquittal on the basis of legal entrapment because he declined to seek a jury instruction on the question. (See Question Presented No. 4) The Court of Appeals held that "a defendant who fails to assert entrapment as a factual defense at his trial, cannot assert it as a legal defense to his conviction." (29a) Petitioner believes that ruling was inconsistent with the theory behind this Court's holding in Sorrells, supra, that entrapment does not have to be raised by a plea in bar but is preserved by a plea of not guilty, 287 U.S. 452, because proof of non-entrapped acts is a material element of every offense under federal statutes. See United States v. Demma, 523 F.2d 981, 983 (9th Cir., en banc, 1975). Should the Court grant cert, he would like to reserve the right to brief that issue.

beyond the necessities of legitimate law enforcement." United States v. Jannotti, supra, 501 F. Supp. at 1204. Although the Court of Appeals reversed, 673 F.2d 578 (3d Cir., 1982), it had similar difficulty in determining the appropriate legal standard:

> If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. (673 F.2d at 606)

Viewing the same set of facts, Judge Aldisert, writing for himself and Judge Weis in dissent, found that ABSCAM "eminates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice," and compared the methods employed by the FBI to those of the Gestapo. 673 F.2d at 613. Judge Bryant, who presided at the Kelly case (United States v. Kelly, 539 F.Supp. 363 (DC,DC 1981), also acquitted the defendant on Due Process grounds, because the government agents persisted in their

effort to corrupt the Congressman after he had rejected their initial bribe offer -- a situation remarkably similar to what was done to Thompson. 539 F. Supp. at 377.[33]

In this case, Judge Pratt could discern no clear standard from the case law to determine whether the government conduct was "outrageous," but constructed his own 22-point test. (138-40a) The Second Circuit ignored Judge Pratt's standard, and appeared to limit the Due Process defense to cases of coercion and bodily intrusion. (32a)

The conflict in the Circuits over the proper due process standard is graphically reflected in the unseemly struggle that took place between the United States Attorneys offices in New Jersey and Brooklyn over ABSCAM procedures, resulting in a decision by the chief prosecutor to try as many of the cases as possible in the Second Circuit rather than in the Third Circuit, where the prevailing precedent was

[33]Judge Penn has had these same issues under advisement for more than a year in the Jenrette case. (D.C., D.C. Crim. Case 90-289)

United States v. Twigg, 588 F.2d 373 (1978).[34] Former New Jersey United States Attorney William Robertson testified to this conflict before the House Judiciary Committee on September 16, 1982, stating that he had unsuccessfully resisted pressures from Washington to transfer the cases to the Eastern District of New York because he felt that would be improper "forum shopping."[35]

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[34] In Twigg, the 3rd Circuit had dismissed a prosecution because government agents had generated crimes by the defendant "merely for the sake of pressing criminal charges against him when ... he was lawfully and peacefully minding his own affairs." 588 F.2d at 381.

[35] According to Robertson:

> After the conclusion of the meeting, Mr. Weingarten approached me privately and indicated that "Washington" wanted him to determine what my position or reaction would be to transferring the MacDonald matter to the Eastern District of New York in order to avoid the impact of the Twigg decision.... [A]fter I had a chance to reflect further on the transfer question, I indicated to Mr. McMurray ... that he should advise Mr. Weingarten that I thought about the proposal some more and that I firmly opposed any transfer of the matter since it would be viewed as forum shopping and an abuse of the Grand Jury in the District of New Jersey. (FBI Undercover Guidelines: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong.,

This case is the paradigm of government "outrageousness" under the test employed by the Third Circuit in Twigg -- the creation of a criminal enterprise out of whole cloth and the enticement of suspicion-free persons into the net.[36] Indeed, it would appear that in targeting Thompson the FBI violated the Attorney General's own Guidelines on Criminal Investigations of Individuals and Organizations, which provide that individuals "should be free from law enforcement scrutiny that is undertaken without a valid factual predicate,"[37] and

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2d Sess. (Hereinafter House Hearings), unpublished statement of William Robertson at 24-5).

[36]One ABSCAM critic commented: "It is bad, evil, illegal and unconstitutional for officers of the United States to engage in the deliberate manufacture of crimes in the hope that their synthetic crimes will ensnare the bad guys." Gould, "A Defeat for Law and Order," New York Law Journal (Feb. 15, 1980).

[37]The American Civil Liberties Union in its report on "The Lessons of ABSCAM" as well as almost every scholar who has commented on ABSCAM -- both those who support such sting operations as necessary law enforcement techniques and those opposed to them -- agree that there ought to be a factual threshhold of suspicion before a bribe offer is made. A number of those comments are set forth in the Final Report of the Senate Select Committee on ABSCAM. See especially excerpts from Professor James Q. Wilson, the

further provide:

> An investigation may be opened when there are facts and circumstances that "reasonably indicate" a federal criminal violation has occurred, is occurring or will occur. This standard of "reasonable indication" is substantially lower than probable cause, but does require specific facts or circumstances indicating a violation. (DP Ex. 3) (emphasis added)[38]

ABSCAM makes clear that the Justice Department and FBI cannot be relied upon to enforce their own guidelines for protection of individual rights and emphasizes the need for judicial guidelines.

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criminologist; Amitai Etzioni, professor of sociology at George Washington University; and Professor Louis Seidman of the Georgetown Law Center. ("The ABSCAM Operation: An Example of the Benefits and Risks of a Long-Term, Complex FBI Undercover Operation and a Demonstration of the Need for Modifications to Existing Statutes, Guidelines and Operational Procedures," Final Report of the Senate Select Committee, Introduction at 5-6. Hereinafter Senate Final Report. References are to the mimeographed version, each separately titled section of which is independently paginated.)

[38]Although these Guidelines were not promulgated until Dec. 2, 1980, the issuing statement by Attorney General Civiletti asserted that they essentially "reaffirm current investigative practices of the FBI."

Indeed, not only was the Attorney General's "predicate" Guideline violated by the ABSCAM probers, wholesale violations of many of the investigative Guidelines are pointed out in the Final Report of the Senate Select Committee. That Report harshly criticizes the operation for reliance on corrupt and unreliable middlemen who were permitted to clandestinely share in alleged bribe payments and went largely unsupervised in their endeavors to entice suspicion-free public officials before the ABSCAM cameras.[39] Former New Jersey US Attorney William

[39]Among the Select Committee's findings:

> The FBI's consistent practice in ABSCAM was to rely, in approving bribe offers, upon the representations of middlemen that specified public officials would accept bribes. Some of those representations were uncorroborated in every sense of the word: the FBI had no extrinsic evidence that the named public official had previously accepted or solicited a bribe or had committed any other crime; and the FBI had no extrinsic evidence that the middleman knew the public official well enough to know whether his own representations about the public offical were true.... In some cases the FBI continued to rely on middlemen even after they had proved to be unreliable in this regard. (Summary of Findings at 39-40)

Robertson was even more scathing in his criticism of his former Justice Department colleagues in testimony before the House Judiciary Committee. Robertson testified that his superiors in Washington even resisted his office's demands that exculpatory evidence be examined and turned over to those who were indicted. He declared: "I have never during the course of my career as a prosecutor been exposed to such institutional resistance and an intentional attempt to thwart the discovery of facts that were relevant to a criminal investigation." (House

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Furthermore, the Committee found that "the middleman had a strong incentive to produce as many public officials as he could, hoping that some percentage of them could be persuaded to accept bribes, whatever their initial inclinations or past records might have been. (Deficiencies Actual and Alleged, at 27)

The Committee also found the FBI ignored guidelines requiring that all "bribe" offers be "clear and unambiguous" as to their illegal nature. (Allegations That Videotape Meetings With Thompson and Murphy Were Deliberately Ambiguous, at 3) For example: "Despite instructions from FBI HQ that on their face seemed to forbid it, Amoroso allowed Criden to leave both [the Murphy and Thompson] meetings in possession of the money." (Id. at 7)

Hearings, Robertson statement at 53)

The evidence of such "due process" infringements in the ABSCAM record are massive and are common to all of the ABSCAM prosecutions.[40] Unique to the Thompson prosecution, and what makes this probably the most "outrageous" case of all, is the deliberate effort of FBI sting-man Weinberg to seduce the defendant by working on his perceived weakness for alcohol. It will not go down as one of law-enforcement's finest hours when Weinberg instructed Criden on how to get Thompson to accept their offer before the camera:

THE SHITTIN GUY'S A BOOZER;

****

GIVE HIM ANOTHER DRINK[41]

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[40]And presumably will be detailed in the other Cert petitions. E.g., Petitioner is aware that the Murphy Petition will focus on the creation of false evidence by creative and selective use of audio and video tapes and the use of ambiguous language.

[41]This may well have been the incident the editors of the prestigous New Jersey Law Journal had in mind when they wrote: "Where citizens' stomachs are turned by fundamental unfairness, is there an equivalent federal organ to detect that unfairness? The ABSCAM proceedings wending their way through the judicial system will tell whether there is a federal stomach capable of being turned." Editorial, "ABSCAM

Unless this Court grants Certiorari, such operations are going to become, indeed already have become,[42] commonplace in American law enforcement. Professor Alan Dershowitz of Harvard Law School recently observed:

> The scam as a technique of law enforcement is now out of control. Every prosecutor, undercover investigator and policeman ... is free to conduct any scam he sees fit without fear of judicial rebuke.... The government cannot be allowed to select targets at will, expose them to all manner of temptation and then pounce on those who succumb. (quoted in the Senate Final Report, Introduction at 2)

Indigestion," (Feb. 5, 1982)

[42]The budget for FBI "sting" operations rose from $1 million to $4.5 million and the number of such operations from 53 to 463 between 1977 and 1981. (Senate Final Report, Introduction, at 1.) The Select Committee further reports that the Internal Revenue Service, the Drug Enforcement Administration, the Immigration and Naturalization Service and state and local governments are greatly expanding the use of "sting" operations. (Id. at 10)

Such operations are appealing to police for several reasons. First of all, compared to real crime it's like shooting fish in a barrel. Furthermore, as a sociologist states, it's a way of avoiding disfavored legal restraints. See Marx, "Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work," Crime and Delinquency (April, 1982)

Professor Dershowitz's observation is regularly confirmed by reports of mini-ABSCAMs all across the country. A sampling:

. In Bridgeport, Conn. the Chief of Police wound up arresting an FBI sting-man who was told by the FBI to offer the chief a bribe in exchange for a towing franchise. The Bridgeport police confiscated both the FBI "payoff" and its surveillance equipment. (See New York Times, Aug. 21, 1981, B3)

. A New Jersey Superior Court Judge recently dismissed the indictment of several jockeys for fixing races at the instigation of State Police emulating the FBI. (New York Times Jan. 7, 1982, II, 9:1) Noting that the police had no basis to suspect any of the jockeys were corrupt, the Judge declared: "The government in effect committed crimes in order to ensnare some jockeys. If police agencies are given such free rein, then the only limits to their undercover 'stings' are their imaginations." (New Jersey v. Kelley, et. al., Sup. Ct. of N.J., Bergen County, Law Div., Ind. No. SGJ-85-82(4), Nov. 8, 1982)

. In Cleveland, the FBI spent 4 years seeking to corrupt judges and other court personnel in an alleged bribery investigation. The Cleveland 'Criden' was a man named Marvin Bray, who said he could fix judges for a price. Bray had friends pose as judges and wound up splitting the FBI's bribe money with them. (Cleveland Plain Dealer, July 4, 1982) The only people who wound up indicted were sting-man Bray and two of his associates who impersonated judges. In the process, however, the FBI smeared the reputation of Municipal Judge Clarence Gaines before discovering the man who impersonated Judges Gaines before the FBI's hidden cameras was one of Bray's associates. (Cleveland Plain-Dealer, July 21)

Unless this Court agrees to review this case and set some threshhold requirement before police can instigate crimes and attempt to ensnare suspicion-free citizens, we are all suspects -- and the U.S.A. will be a nation of suspects.

III. THE JURY INSTRUCTION ON CREDIBILITY CHILLS THE RIGHT OF A CRIMINAL DEFENDANT TO TAKE THE WITNESS STAND ON HIS OWN BEHALF, IMPROPERLY INFLUENCES THE JURY, AND CONFLICTS WITH THE DECISIONS OF THIS COURT IN HICKS V. UNITED STATES AND REAGAN V. UNITED STATES

Thompson took the stand at trial and testified in his own defense that he neither had promised to assist the fictional sheiks in their immigration problems, nor had he received any beneficial quid pro quo in exchange. In contradiction, the Government produced two live witnesses, Ellis Cook and John Murtha. Cook gave hearsay testimony under immunity that his partner Criden had told him that he gave $25,000 to Thompson. (Tr. at 430-431) Murtha testified that Thompson came to him on the floor of the House, said some Arabs had several hundred million dollars for investment, and that "There would also be some walking around money available ... $50,000." (Tr. at 441-442)

Credibility of the witnesses was significant. On this issue, Judge Pratt began the Thompson part of

the credibility charge with the comment that a defendant "has a deep personal interest in the result of his prosecution." He then continued to refer in progressively harsher language to Thompson's "greatest interest in its outcome;" to Thompson's "motive for false testimony;" to Thompson's "interest in result ... of a character possessed by no other witnesses," and finally to Thompson's "strong motive to lie." The judge culminated this phase of the charge with the comment that although Thompson "has a strong motive to lie to protect himself, it by no means follows that he's not capable of telling the truthful, straightforward story." (Tr. at 3085-6) The contrast could not have been more extreme in the credibility charge regarding the government witnesses. Judge Pratt informed the jury that the Government must "take the witnesses to a transaction as they are," otherwise "it would be difficult to detect or prosecute some wrongdoers." He concluded that "The thrust of all that I have said to you about accomplices, informers and immunized witnesses is to

caution you to be careful in reviewing that testimony and weigh it with care." (Tr. at 3083) (emphasis added)

This charge is in direct conflict with the only two directly applicable decisions of this Court. In Hicks v. United States, 150 U.S. 442, 451 (1893), the trial judge had charged the jury to consider the self-interest of the defendant which might lead him "away from the truth." The Supreme Court reversed the conviction because of the charge, stating:

> [I]t must be remembered that men may testify truthfully, although their lives hang in balance, and that the law, in its wisdom, had provided that the accused shall have the right to testify in his own behalf. Such privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. (150 U.S. at 452)

The Court cited Hicks with approval in Reagan v. United States, 157 U.S. 301 (1895) and emphasized that the trial court

> is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defen-

> dant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness. (157 U.S. at 310)

No Circuit other than the 2d has permitted charges that explicitly instruct the jury that a defendant "has a strong motive to lie to protect himself." Compare opinion by Judge (now Mr. Justice) Blackmun in Taylor v. United States, 390 F.2d 278, 284-5 (8th Cir., 1968). See also United States v. Saletko, 452 F.2d 193, 197 (7th Cir., 1971), cert. den. 405 U.S. 1040 (1972).

With the increasing use of immunized witnesses and informers, with the growing need for defendants in "scam" types of prosecutions to explain away the deliberate manufactured ambiguities captured on secret government camera, the type of credibility charge given below is nothing short of a corruption of the truth seeking function of the trial process. It demands this Court's review.

IV. THE DECISION BELOW UPHOLDING THE GOVERNMENT'S CONCEALMENT OF THE IMMUNITY GRANTED CONGRESSMAN MURTHA DENIED PETITIONER THOMPSON HIS RIGHT TO A FAIR TRIAL, AND CONFLICTS WITH THIS COURT'S OPINION IN BRADY V. MARYLAND AND RELATED CASES

Congressman John Murtha was the only witness in this case to take the stand and give direct, first hand testimony implicating Thompson in the criminal charges. The issue of his credibility thus was crucial in this case.

There was a videotape showing Murtha in a compromising situation with FBI agents at the W Street house. Consequently, prior to trial, Thompson made a specific request for any materials regarding witness immunity, including "all information reflecting or referring to or constituting, containing, reflecting or suggesting: (a) any promises or indications of immunity, leniency, decisions not to prosecute or favorable treatment to any person, including ... John P. Murtha." (letter to Thomas J. Puccio, Esq. dated June 23, 1980, Exhibit A to Motion for Production of Documents and other Materials) (emph. added) The

government did not inform Thompson prior to trial of any "deals" with Congressman Murtha.

At trial, Murtha was pressed hard on cross-examination, but kept denying that any "deal" had been made with the government. (Tr. at 1864, 1865, 1885, 1893). The government was asked to state on the record the full extent of any promises or assurances made to Murtha; and Prosecutor Puccio denied any promise that Murtha would not be indicted at a later time. (Tr. at 1932)

At trial's end, Thompson wanted a stipulation on Murtha's status for closing argument, and Puccio stated that he would not speculate on whether or not there would be any future indictments. (Tr. at 2781-2782) Irving Nathan, then Deputy Assistant Attorney General, was in the courtroom at the time, and said nothing. He later admitted at the "due process" hearings that a decision had been made not to indict Murtha at the time the decision was made to go ahead with the indictments against Thompson and Murphy. (DP Tr. at 608). He further testified that

the House Ethics Committee, of which Murtha was a ranking member, had been advised in the summer of 1980, about the time Congressman Kelly was indicted, that no additional indictments would be sought. (DP Tr. at 611-612)

This Court held in Brady v. Maryland, 373 U.S. 83 (1963) that the suppression by the prosecution of evidence favorable to the accused is a violation of due process when the evidence is material to either guilt or punishment. When a specific request is made, the evidence suppressed is deemed material if its disclosure "might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976). Government concealment that a witness testified under a grant of immunity or promise of leniency is a classic example of a Brady violation. DeMarco v. United States, 415 U.S. 449 (1974); Giglio v. United States, 405 U.S. 150 (1972).

Full disclosure is especially required when it is the government which originates the criminal design and implements the details through corrupt

middlemen to add the requisite touch of authenticity to the "scam." The high risk of corruption and self-aggrandizement requires that the prosecutor be held to the highest duty to disclose all information relevant to the defendant's preparation for trial, and for a fair trial itself.

The issue here is important to the conduct of criminal trials in federal courts, is recurrent, and warrants this Court's attention.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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January 1983

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Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1982

No.

FRANK THOMPSON, JR.,

Petitioner

-vs.-

UNITED STATES OF AMERICA,

Respondent

APPENDIX FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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DECISION OF UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT DATED NOVEMBER 17, 1982 DENYING PETITION FOR REHEARING

August Term, 1981

(Submitted September 29, 1982

Decided November 17, 1982)

Docket No. 81-1345

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK THOMPSON, JR.,

Defendant-Appellant.

Before:

LUMBARD, FRIENDLY, NEWMAN,

Circuit Judges.

On Petition for Rehearing

NEWMAN, *Circuit Judge*:

On petition for rehearing, Thompson contends, among other things, that the words he spoke to Criden at the evening meeting at the W Street house on October 9,

1979, were "You look at that for me will you?" and not "You look after that for me will you?" as reflected in the panel's opinion and in the Government's version of the videotape transcript given to the jury. At the request of Thompson's counsel we viewed the videotape of this meeting. After viewing and hearing the videotape we cannot be certain whether the disputed word was "at" or "after." If we give the defendant the benefit of the doubt, this would surely have aided his argument to the jury that he thought the briefcase transferred at the meeting contained investment documents (to be looked at) rather than money (to be looked after). But this interpretation of the videotape would not alter the sufficiency of the evidence on which the jury convicted nor our assessment of the investigation for purposes of rejecting the due process challenges.

On the contrary, viewing the videotape reenforces our conclusion that the events at the evening meeting on October 9 reflect a contrived arrangement whereby $50,000 was transferred pursuant to Thompson's ground rule, explained earlier in the day by Criden to Amoroso and Weinberg, that money was not to be discussed. At the very start of the meeting, Criden says, "Frank understands the situation." Criden then ceremoniously lifts the briefcase from a table to his right and places it between himself and Thompson without any conversation by anyone concerning the briefcase or its contents. Amoroso says, "There's the briefcase," pointing to it. Thompson then says to Criden, "You look at that for me will you?" The visual impact is of people handling and talking about a briefcase containing something of importance, not simply drafts of documents for a lawyer's perusal. Thompson's knowledge that the briefcase contained money is supported by several circumstances. Later in the conver-

sation Amoroso said the morning conversation had been "shadow boxing," to which Thompson replied, "Well, you have to be careful." The next day Criden told Cook that he had handed Thompson $20,000 of the $50,000 in the briefcase. Still later Thompson told Congressman Murtha that there would be $50,000 in "walking around money" for Congressmen willing to help.

The petition for rehearing is denied.

DECISION OF UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT, DATED SEPTEMBER 3, 1982, AFFIRMING CONVICTION

Nos. 904, 905, 906, 907, 840, 841, 855
—August Term, 1981

(Argued April 5, 1982 Decided September 3, 1982)

Docket Nos. 81-1342, 1343, 1344, 1446, 1345, 1346, 1347

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL O. MYERS, ANGELO J. ERRICHETTI, LOUIS JOHANSON, and HOWARD L. CRIDEN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK THOMPSON, JR. and JOHN M. MURPHY,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND F. LEDERER,

Defendant-Appellant.

Before:

LUMBARD, FRIENDLY and NEWMAN,
Circuit Judges.

Appeals from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge), after three separate jury trials in which four United States Congressmen and three other defendants were found guilty of violations of 18 U.S.C. §§ 201(c), 201(g), 203(a), and 371, arising out of the Abscam investigation. Judgments affirmed on all counts as to all appellants, except Count Three (section 203(a)) of the indictment against John M. Murphy, which is reversed and remanded for a new trial.

NEIL JOKELSON, Philadelphia, Pa. (Rochelle Newman, Jokelson and Rosen, Philadelphia, Pa., on the brief), *for defendant-appellant Myers.*

RAYMOND A. BROWN, Newark, N.Y. (Henry F. Furst, Newark, N.Y., on the brief), *for defendant-appellant Errichetti.*

JOHN J. DUFFY, Philadelphia, Pa. (Steven H. Gifis, Alan Dexter Bowman, Princeton, N.J., on the joint brief for Myers, Errichetti, and Johanson), *for defendant-appellant Johanson.*

RICHARD BEN-VENISTE, Washington, D.C. (Ben-Veniste & Shernoff, Washington, D.C., on the brief), *for defendant-appellant Criden.*

TIMOTHY SAVAGE, Philadelphia, Pa., *for defendant-appellant Lederer.*

DANIEL H. POLLITT, Chapel Hill, N.C., and Frank Askin, Newark, N.Y. (Neal Rutledge, Washington, D.C., on the brief), *for defendant-appellant Thompson.*

MICHAEL E. TIGAR, Washington, D.C. (Samuel J. Buffone, Linda Huber, Tigar, Buffone & Doyle, Washington, D.C., on the brief), *for defendant-appellant Murphy.*

EDWARD KORMAN, U.S. Atty., and Lawrence Sharf, Sp. Atty., Brooklyn, N.Y. (Thomas P. Puccio, Atty-in-Charge, Organized Crime Strike Force, Edward A. McDonald, Sp. Atty., Gregory J. Wallance and Vivian Shevitz, Asst. U.S. Attys., Brooklyn, N.Y., on the briefs), *for appellee.*

NEWMAN, *Circuit Judge*:

In *United States v. Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) (*Myers I*), we ruled that the Government had not violated the defendant's constitutional rights as a Member of Congress by requiring him to stand trial on charges of bribery arising out of an undercover "sting" operation now well known to the nation as Abscam. *See also United States v. Murphy*, 642 F.2d 699 (2d Cir. 1980). The *Myers* ruling, made in advance of trial, was based on the face of the indictment that had been returned. Now before us are appeals from judgments of conviction entered in the Eastern District of New York (George C. Pratt, Judge), after three separate jury trials in which four Congressmen and three co-defendants were found guilty of various offenses related to corruption of public office arising out of the Abscam investigation. Nos. 81-1342, 81-1343, 81-1344, and 81-1446 are appeals from convictions in the joint trial of appellants Michael O. Myers, formerly Congressman from the First District of Pennsylvania; Angelo J. Errichetti, formerly Mayor of Camden, New Jersey; Louis Johanson, formerly a member of the City Council in Philadelphia, Pennsylvania; and Howard L. Criden, a law partner of Johanson's. No. 81-1347 is an appeal from the conviction of appellant Raymond F. Lederer, formerly Congressman from the Third District of Pennsylvania, at a separate trial. Nos. 81-1345 and 81-1346 are appeals from the convictions of Frank Thompson, Jr., formerly Congressman from the Fourth District of New Jersey, and John M. Murphy, formerly Congressman from the Seventeenth District of New York, at a joint trial. Though some of the three trials present distinct issues, all seven appellants raise questions of such similarity that we have found it appropriate to consider all of the claims in one opinion.

For the reasons that follow, we have concluded that all of the judgments should be affirmed on all counts, with the exception of Count Three of the indictment against Murphy, as to which we reverse and remand for a new trial.

I.

Myers, Errichetti, Johanson, and Criden were charged in a three-count indictment. Count One alleged a conspiracy in violation of 18 U.S.C. § 371 (1976) to defraud the United States and to violate 18 U.S.C. § 201, punishing bribery and the receipt of bribes by public officials including Members of Congress. This count alleged that the conspiracy sought to defraud the United States of the Government's right (a) to the honest service of Congressman Myers "in relation to matters before the House of Representatives performed free from corruption"; (b) to have the "official action" of Congressman Myers "in attempting to influence decisions of departments and agencies of the United States in relation of matters of immigration and residence performed free from corruption"; (c) to have the immigration laws "administered honestly and impartially, free from improper and undue pressure and influence"; and (d) to have officials enforcing the immigration laws "perform their official duties free from impairment and obstruction by the exercise upon them of corrupt . . . pressure and influence." The conspiracy to violate section 201 was alleged to consist of the defendants' agreeing to demand and receive money for Congressman Myers in return for the Congressman's "being influenced in his performance of official acts."

Count Two alleged bribery in violation of 18 U.S.C. § 201(c) and § 2. This count alleged that Congressman

Myers, aided and abetted by the other co-defendants, agreed to receive and received money "in return for" his "being influenced in his performance of official acts as a member of Congress, to wit, his decisions and actions in a matter involving immigration, residency and citizenship of foreign nationals which might at any time be pending or which might by law be brought before the House of Representatives and departments" of the Government. Count Three alleged that all four defendants traveled in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. § 1952 and § 2.

The charges stemmed from an elaborate undercover "sting" operation conducted by the Federal Bureau of Investigation. Three FBI agents and a private citizen, all acting in an undercover capacity, purported to be representatives of two Middle Eastern sheiks operating a fictitious entity known as Abdul Enterprises, Ltd. The undercover operatives let it be known that their principals were interested in investing money in the United States and immigrating to this country. The core allegation against Myers and his co-defendants was that on August 22, 1979, Myers received $50,000 in return for his promise to introduce private immigration bills permitting the sheiks to remain in the United States and to take other necessary action including intervention with the State Department. A jury trial was begun on August 11, 1980, and concluded on August 29, 1980. The jury convicted all four defendants on all three counts. Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

In a separate indictment, Lederer was charged, along with Errichetti, Johanson, and Criden, in a four-count

indictment. Three of the counts paralleled the conspiracy, bribery, and interstate travel counts of the Myers' indictment. In addition, a fourth count alleged receipt of an unlawful gratuity by Lederer, in violation of 18 U.S.C. § 201(g). This count alleged that Lederer, aided and abetted by his co-defendants, agreed to receive and received money "for and because of" the performance of his official duties in a matter involving immigration of foreign nationals. The core allegation in this indictment was that on September 11, 1979, Lederer received $50,000 in return for his promise to help the sheiks with their immigration problems. Lederer's co-defendants were severed from his case after their convictions in the *Myers* case. Lederer's trial began January 5, 1981, and concluded January 9, 1981. The jury convicted Lederer on all four counts. He was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

In a third indictment, Thompson and Murphy were charged, along with Criden and Joseph Silvestri, a New Jersey businessman, in a five-count indictment. Counts One, Two, and Four paralleled the conspiracy, bribery, and interstate travel counts of the Myers' indictment. Count Three charged a so-called conflict of interest, in violation of 18 U.S.C. § 203(a). This count alleged that Thompson and Murphy, aided and abetted by Criden, agreed to receive and received money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in a matter involving immigration of foreign nationals. Count Five, paralleling a count of the Lederer indictment, charged receipt of an unlawful gratuity, in violation of 18 U.S.C. § 201(g). The core allegation in this indictment was that on October 20, 1979, Murphy received $50,000, subsequently shared with Thompson, in return

for their promises to help the sheiks with their immigration problems. The charges against Criden and Silvestri were severed by agreement from the charges against Thompson and Murphy. Trial (the second in the sequence of three) began on November 10, 1980, and concluded on December 3, 1980. Before the case went to the jury, Judge Pratt dismissed Count Four charging unlawful interstate travel. The jury found Thompson guilty on Counts One, Two, and Five charging conspiracy, bribery, and receipt of an unlawful gratuity; he was found not guilty on Count Three charging conflict of interest. Murphy was found guilty on Counts One, Three, and Five charging conspiracy, conflict of interest, and receipt of an unlawful gratuity; he was found not guilty on Count Two charging bribery. Thompson was tentatively sentenced to the maximum allowable terms, pursuant to 18 U.S.C. § 4205(c), pending further consideration of his medical condition.[1] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

In the interim between the conclusion of the three trials and the sentencing of all appellants, Judge Pratt conducted a consolidated hearing to consider various claims by all seven appellants that the Government's conduct in the Abscam investigation and in the prosecution of the charges at trial violated rights protected by the Due Process Clause of the Fifth Amendment. In considering these allegations, Judge Pratt took testimony during a 16-day "due process" hearing conducted in January and February, 1981. Judge Pratt also permitted the seven appellants to rely upon evidence pertinent to their due

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[1] Imposition of a tentative sentence pursuant to 18 U.S.C. § 4205(c) (1976) does not alter the finality of the judgment of conviction for purposes of our appellate jurisdiction. *Corey v. United States*, 375 U.S. 169, 174-76 (1963) (construing predecessor statute).

process claims that had been presented in other proceedings stemming from the Abscam investigation. These included the record of the trial and the "due process" hearing concerning charges against former United States Senator Harrison A. Williams, Jr., of New Jersey, in the Eastern District of New York, and the trial and "due process hearing records of charges against former Philadelphia Councilmen Harry P. Jannotti and George X. Schwartz in the Eastern District of Pennsylvania (John P. Fullam, Judge),[2] against former Congressman John W. Jenrette and a co-defendant in the District of Columbia (John G. Penn, Judge), and against former Congressman Richard Kelly and two co-defendants in the District of Columbia (William B. Bryant, Judge).[3] Based upon this comprehensive record, Judge Pratt, in a detailed and thoughtful opinion, denied the due process contentions of the seven appellants as well as their multitude of other claims attacking the validity of their convictions. *United States v. Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981).

II.

The background of the Abscam operation is described by Judge Pratt as follows:

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2 Judge Fullam set aside the jury verdicts that had been returned against Jannotti and Schwartz, *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), but on appeal the Third Circuit reinstated the verdicts, *United States v. Jannotti*, 673 F.2d 578 (2d Cir. 1982) (*en banc*), *cert. denied*, 50 U.S.L.W. 3903 (U.S. June 7, 1982).

3 Judge Bryant set aside the jury verdicts that had been returned against Kelly and his co-defendants and ordered a new trial for the co-defendants. *United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982), *appeal docketed*, No. 82-1660 (D.C. Cir. June 15, 1982).

"Abscam" is the code word given by the Federal Bureau of Investigation to an undercover "sting" operation conducted out of the FBI office at Hauppauge, Long Island, New York, under the supervision of agent John Good. Abscam began after Melvin Weinberg in 1977 was convicted in the Western District of Pennsylvania on his plea of guilty to fraud. In return for a sentence of probation Weinberg agreed to cooperate with the FBI in setting up an undercover operation similar to the London Investors, Ltd. "business" that Weinberg had used with remarkable success before his arrest and conviction in Pittsburgh.

For most of his life Weinberg had been a "con man" operating in the gray area between legitimate enterprise and crude criminality. For a number of years in the 1960s and early 1970s, he had been listed as an informant by the FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on the charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his guilty plea and agreement to cooperate with the FBI.

As agent-in-charge of the FBI's Long Island office Good was, at all times, the supervising agent for Abscam. Initially, Weinberg worked directly under special agent John McCarthy who later was replaced by special agent Anthony Amoroso. Both McCarthy and Amoroso worked undercover with Weinberg.

The general pattern of the "scam" or "sting" operation reflected Weinberg's earlier theme of representing wealthy Arab interests who had large sums of cash available for business opportunities in this country. When operating outside the law in Huntington, Long Island as London Investors, Weinberg's method had been a "front-end scam" for real estate investment wherein he would promise to obtain large loans for his victims and pick-up "appraisal" or "processing" fees of several thousand dollars, but without ever producing the final loans.

Although not identical to London Investors, the initial plan developed by Weinberg and the FBI was similar. Weinberg was to present himself as a business agent for "Abdul Enterprises", an organization backed by two extremely wealthy Arab sheiks looking for American outlets for their cash. He would pass the word of big money available for deals to other con men and people who move between the legitimate and illegitimate. If criminal proposals appeared, appropriate action would be taken by the FBI.

Weinberg and the agents set up business in an office in Holbrook, Long Island. The FBI's code name "Abscam" came from the first two letters of "Abdul", combined with the word "scam".

At first Abscam's focus was upon stolen and forged securities and stolen art work. Other "investment" opportunities soon presented themselves, and quickly the investigation turned itself toward Atlantic City and the gambling casinos which were then being proposed and constructed. As word spread about Weinberg's contact with virtually inexhaustible Arab funds, Angelo Errichetti, who was both mayor

of Camden, New Jersey, and a New Jersey state senator, came on the scene. Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit securities, as well as intimate knowledge of which members of the New Jersey legislature could be bought.

Errichetti brought to the undercover agents Howard Criden, a Philadelphia lawyer seeking to promote a gambling casino in Atlantic City. In July of 1979, Errichetti and Criden met with Weinberg and Amoroso on the sheiks' yacht in Florida to discuss financing for the proposed casino that a client of Criden's wanted to build. In the course of the day Amoroso and Errichetti discussed the problem that might be faced by the sheiks should a revolution occur in their country and should they want to come to the United States as permanent residents. Amoroso told Errichetti that he thought cooperation of public officials would be needed and that money would be no problem.

Immediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf. Meetings were arranged at various locations in New York, Philadelphia and Washington where the FBI monitored the proceedings with concealed videotape cameras the microphones. Where videotape was not feasible, audio recordings were used.

527 F. Supp. at 1209-10.

Once the focus of Abscam shifted to the "asylum scenario,"[4] as the parties at the trials characterized the plan to have Abdul Enterprises offer cash to public officials in return for help on immigration matters, events rapidly unfolded, leading to the incidents on which the charges against the seven appellants were based. After returning to Philadelphia from the cruise on the yacht, Criden told his law partners, Johanson and Ellis Cook, that Errichetti had told him they could make substantial sums of money if they knew any Congressmen who would be willing to meet the sheik or his representatives. Cook testified for the Government under a grant of immunity. Criden reported that the money, $100,000, would be paid directly to each Congressman and then shared with the law partners. The purpose, according to Criden and Johanson, was that by meeting and paying the Congressman, the sheik would have a "friendly face," someone "that sort of owed him a favor" and would "help the sheik come into this country" and also help members of his family. Criden suggested that Johanson should contact Myers and Lederer, since Johanson knew both Congressmen. Johanson then contacted Myers and reported that Myers was willing to attend the proposed meeting.

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4 There is room for dispute as to who originated what came to be called the "asylum scenario," the willingness of Abdul Enterprises to pay money to public officials in return for help with future immigration problems that the sheiks might encounter. Weinberg testified before Judge Fullam that the idea first occurred to him while on the yacht on July 26, 1979, as a result of a suggestion of Criden. Agent Amoroso testified before Judge Fullam and Judge Pratt that he thought of the idea the previous day as a result of a newspaper article about the immigration problems of former Nicaraguan President Anastasio Somoza. The Government argued to Judge Bryant that the idea was originated by Errichetti, Criden, and Myers. At least a general reference to the idea was broached by Weinberg to George Katz, a defendant in another Abscam case, in a recorded telephone conversation held on July 14, 1979.

The Payment to Myers. The first meeting with Myers took place on August 22, 1979, at the Travelodge International Hotel near Kennedy Airport on Long Island. Myers, Johanson, Criden, and Errichetti drove from New Jersey and Pennsylvania to the Pan American terminal at the airport, where they met for a brief conversation. As all four understood, only Myers and Errichetti were to attend the hotel meeting with the sheik's representative. Just prior to the meeting the FBI instructed Weinberg to inform Errichetti in the hotel lobby that the previously mentioned figure of $100,000 had been reduced to $50,000. Errichetti and Myers then met with Amoroso (who used the name Tony DeVito) and Weinberg in a hotel room. The meeting was recorded on videotape. Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his conversation on the yacht with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of a matter, first of all, is private bills that can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

After leaving the hotel, Errichetti met briefly with Criden at Kennedy Airport. Criden then returned to his law office in Philadelphia with the envelope Amoroso had handed to Myers. Criden reported to Cook that Errichetti had taken $15,000 for himself. Shortly thereafter Myers and Johanson arrived and conferred with Criden. Cook was then told that Myers had agreed to take only $15,000; of the remaining $20,000, Criden received $9,000 or $9,500, Johanson received $6,000 or $6,500, and Cook received $4,500.

At a subsequent meeting on January 24, 1980, at the Barclay Hotel in Philadelphia, Myers and Criden met with two other FBI undercover agents, posing as representatives of the sheiks. These agents were Michael Wald (using the name Michael Cohen) and Ernest Haridopolous (using the name Ernie Poulos). Myers vehemently complained about ending up with only $15,000, after expecting to retain $50,000 for himself out of an anticipated payment of $100,000. As Myers pointed out, "Who am I goin' to complain to . . . my congressman[?]" The undercover agents mollified Myers with an offer to pay an additional $35,000, which Myers said would be agreeable. On February 2, 1980, the date set for the additional payment, Myers was questioned at his home by FBI agents who identified themselves and said they were investigating the activities of Criden, Errichetti, Weinberg, DeVito (Amoroso), and Cohen (Wald). Myers denied knowing Weinberg, DeVito, or Cohen. The same day FBI agents interviewed Johanson. He admitted driving to Kennedy Airport for the August meeting and receiving a stack of cash. He said he realized the seriousness of this type of activity, but could not resist the chance to make easy money.

Claims at the Myers *Trial.* Myers acknowledged at his trial that he had retained $15,000 of the $50,000 handed to him by Amoroso. His defense, also adopted by his three co-defendants, was that all of his statements to Amoroso and Weinberg at the hotel on Long Island and to Wald and Haridopolous at the hotel in Philadelphia were what he termed "playacting." Myers, the only defendant of the four on trial to testify, claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the August 22 meeting what he should say to impress the sheik's representatives. Myers claimed he did not intend to fulfill any of the promises he made at the meeting. Over the Government's objection, Judge Pratt instructed the jury that they should convict the defendants at the *Myers* trial of bribery only if they found that Myers was not "playacting." The jury's verdicts constitute a rejection of Myers' defense.

The Payment to Lederer. The initial contact with Lederer, as with Myers, was made by Johanson. He told Cook that Lederer had been briefed on the sheik's immigration problem, on the sheik's interest in investing in Philadelphia, and on the requirement that the Congressman personally receive the $50,000 being offered. Cook testified that Lederer said he "would gladly do it for Lou [Johanson] and all he wanted was a $5,000 contribution for the spring primary." On September 11, 1979, Lederer and Errichetti met with Amoroso and Weinberg at the Hilton Inn near Kennedy Airport. The meeting was recorded on videotape. Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce

legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . . ?" It would be "so much nicer," he continued, if the sheik had a "legitimate interest" in the port of Philadelphia." At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

The next day Criden met with Cook in Philadelphia and handed him two envelopes. One, marked "RL" (Raymond Lederer), contained $5,000; the other, marked "EC" (Ellis Cook), contained $4,500. Criden told Cook that $20,000 had gone to Errichetti, $5,000 to "Mel and Tony" (Weinberg and Amoroso), and the remaining $15,500 to Criden and Johanson. Later Johanson delivered Lederer's $5,000 share to the Congressman. On February 2, 1980, Lederer was questioned by FBI agents about the September 11, 1979, meeting. He denied that Errichetti was present, that private immigration bills were discussed, and that he had received a package or a brown paper bag.

Claims at the Lederer *Trial.* Lederer acknowledged at his trial that he had been given $5,000 of the $50,000 handed to him by Amoroso. His sole defense was that he had been entrapped and that there was no evidence of his predisposition to commit any offenses. The jury, charged with respect to the entrapment defense, rejected it by their verdicts.

The Payments to Thompson and Murphy. In September, 1979, Criden met Silvestri, the New Jersey businessman, in Florida and, knowing of Silvestri's contacts

among Democratic politicians in New Jersey, inquired about Congressmen who might be willing to meet the sheik's representatives. Silvestri suggested Congressman Thompson. On October 4, Silvestri introduced Criden to Thompson, at which time Criden and Thompson spoke privately. That evening Criden told Weinberg that Thompson had agreed to assist and would meet Weinberg and Amoroso in Washington on October 9. Criden told Cook that he had made arrangements so that Thompson would not personally have to take the "package." Thompson and Criden met with Amoroso and Weinberg on the morning of October 9 at a townhouse on W Street maintained by FBI agents. The meeting was videotaped. The discussion centered on the use of private immigration bills to prevent or at least delay deportation. When Amoroso stated, "That's what the money is for," Thompson replied, "I'm not looking for any money." The discussion of private immigration bills continued. Weinberg said the sheik wanted friends he could depend on, to which Thompson replied, "I don't know how many more ways I could say it." At this time no money was transferred.

Later that day Criden returned to the W Street house for a further discussion with Weinberg and Amoroso. This meeting was videotaped. Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers

and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

On the evening of October 9, Thompson and Criden returned to the W Street house and met again with Amoroso. The meeting was videotaped. Criden said, "Frank understands the situation." Amoroso said, "There's the briefcase," pointing to a briefcase containing $50,000 in $100 bills. Thompson said to Criden, "You look after that for me will you?" Thompson and Criden then said they would bring others whom they would carefully screen. Later the group discussed possible investments of the sheik's money in New Jersey. Thompson suggested some possibilities, noting that such investments would put him in a position to justify his support of the sheik. Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." Thompson said the first Congressman he might send would be his "pal" from New York, meaning Congressman Murphy. Thompson said he would "brief" his pal beforehand. As the meeting ended, Thompson and Criden both momentarily lifted the handle of the briefcase, and Criden carried it out.

The next morning Criden told Cook in Philadelplhia how the $50,000 was to be divided. Thompson had taken $20,000,[5] Errichetti would receive $10,000, Silvestri, $3,500, "Mel and Tony," $5,000, and $10,000 for Criden, Johanson, and Cook, leaving $1,500 unaccounted for.

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5 At trial the Government contended that its evidence showed that Thompson had received a portion of the money delivered at the October 9 meeting, but his violation of the bribery and unlawful gratuity statutes was based entirely on the claim that he had received a portion of the money delivered to Murphy and Criden at the October 20 meeting.

On October 10, Thompson met with Congressman Murphy in Murphy's office. After Thompson returned from a brief trip, he arranged for Murphy to meet Criden on October 19, and a meeting with the sheik's representatives was arranged for October 20. Murphy and Criden met with Amoroso and Weinberg at the Hilton Inn near Kennedy Airport on October 20. The meeting was videotaped. The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered, "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard why don't you take care of that."[6]

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6 The Government contends that a close listening of the videotape reveals Murphy to have said, "Howard why don't you take care of that for me?" The Government's transcript of the tape, shown to the jury, contained this version. Murphy's transcript, also shown to the jury, omitted the final words "for me." Our listening of the tape did not catch the words "for me," though it was surely proper to permit the jury to decide for themselves. Whether or not Murphy's line ended with "for me," the echo from the Thompson-Criden dialogue of October 9 is unmistakable.

On October 22, Criden, carrying the briefcase containing $50,000, met with Cook in Philadelphia and explained the expected division of the money. $25,000 would be delivered to Thompson, of which Murphy would receive $15,000; Errichetti would receive $10,000, "Mel and Tony," $5,000, and Criden, Johanson, and Cook, the remaining $10,000. Later that day Thompson telephoned Criden and arranged for Criden to meet him at a motel in New Jersey. Upon his return to Philadelphia, Criden told Cook that he had delivered the money to Thompson.

Subsequent events cast further light on the issue, seriously contested at the *Thompson-Murphy* trial, as to whether either Thompson or Murphy had received money at or as a result of the October 20 meeting. On November 8, Thompson gave Criden the name of Congressman John Murtha of the Twelfth District of Pennsylvania as a next "candidate" for the sheik's representatives. Criden passed Murtha's name along to Amoroso and Weinberg later that day at the conclusion of a meeting the three of them had with Laurence Buser, a friend of Murphy's. The purpose of this meeting was to discuss a proposed shipping deal to be financed by the sheiks in which Murphy, according to Buser, would be a "silent partner." Thompson then undertook to recruit Murtha. As Murtha testified at trial, Thompson told him, in a discussion on the floor of the House of Representatives, about the wealthy Arabs who might need assistance on immigration matters. In a second conversation with Murtha on the House floor, Thompson told Murtha that there would be $50,000 in "walking around money" for Congressmen willing to help. Thompson told Murtha he had already enlisted Murphy in the venture. Ultimately, no money was ever paid to Murtha.

On January 10, 1980, Murphy, Buser, and Criden met with Amoroso and Weinberg at the W Street house. The meeting was videotaped. The discussion concerned the proposed shipping deal, as to which Murphy said he was "not in." Later Amoroso spoke privately with Murphy. In this conversation Murphy acknowledged the dangers of speaking about money and then, in the Government's view, engaged in playacting of his own in denying receipt of any money. Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like that. . . . Particularly Thompson, myself, or Murtha. We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik. After this meeting Murphy requested a private investigator to check out Weinberg, "DeVito," and Abdul Enterprises. Murphy said he thought they were either phonies or government agents.

On February 2, 1980, FBI agents questioned Thompson about his October 9 meeting with Amoroso and Weinberg. Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase.

Claims at the Thompson-Murphy *Trial.* At trial Thompson denied receiving any money. He testified that

his sole purpose is going to the meetings with the sheik's representatives and arranging introductions to Murphy and Murtha was to attract investments to his and their districts. He claimed that he thought the briefcase handed to Criden at the October 9 meeting had contained investment proposals. Murphy neither testified nor presented defense witnesses at trial. His defense, as argued in summation, was that he had not received any money.

III.

We turn first to a series of broad claims asserted, with slight variations, by some or all seven of the appellants as grounds for rejecting the lawfulness of their convictions. These are claims that in several distinct, though related, respects these convictions were obtained in violation of an outer limit of fairness guaranteed by the Due Process Clause of the Fifth Amendment to all persons whenever the Government of the United States acts to detect and prosecute criminal activity. Some of the claims are reenforced by the contention that the Abscam investigation and prosecution of Congressmen, and those chaged with aiding and abetting them and conspiring with them, also violated constitutional protections of Members of Congress, either contained explicitly in the Speech or Debate Clause, U.S. Const. art. I, § 6, or implicitly in the doctrine of separation of powers.

A. Lack of Prior Suspicion.

Appellants contend that it is unconstitutional for the Executive Branch of the Government to predicate the conviction of a Member of Congress upon a criminal opportunity created by agents of the Executive Branch, in the absence of probable cause, or perhaps some lesser

standard of suspicion, to believe that the Congressman has previously engaged in criminal activity. The argument emphasizes the risk of abuse: if the practice is permitted, it might be directed at Congressional targets selected for political reasons, and such political targeting, though violating the First Amendment, *see United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972), would be difficult to establish and therefore too readily available for use by malevolent officials.[7] The argument also suggests that it is simply not the constitutional business of the Executive Branch to test the virtue of Members of a coordinate branch of government.

In *Myers I* we canvassed the considerations supporting and opposing this claim and concluded that while the claim raised important issues of public policy appropriate for the attention of the Executive and Legislative Branches, it did not present a court with a ground for declaring that the Constitution had been violated, 635 F.2d at 938-39. Our reflection upon the issue has been deepened by the passage of time and focused more sharply by the vast record assembled on these appeals, but our conclusion has not been altered. The Constitution permits Congress to apply the criminal law enforcement process to a Member's acceptance of a bribe. *United States v. Brewster*, 408 U.S. 501 (1972). A Congressman is as entitled as any other citizen to the constitutional and statutory protections that limit the power of the Government to investigate and prosecute criminal offenses. But,

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[7] Several appellants in fact contend that in these cases the Government targeted the defendant Congressmen for political or other impermissible reasons. This claim is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved in these appeals. Criden and Johanson selected Congressmen Myers and Lederer. Silvestri selected Congressmen Thompson. Thompson selected Congressman Murphy.

with the exception of section 6 of Article I, which explicitly affords immunity to Senators and Congressmen "for any Speech or Debate in either House" and privilege from arrest for most criminal offenses during attendance at sessions of Congress, the Constitution does not provide Members of the Legislative Branch with any extra protections beyond those guaranteed to all citizens. Specifically, Members of Congress enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may be confronted with a governmentally created opportunity to commit a crime.

What is available in such circumstances is the traditional defense of entrapment, which prevents conviction of a person induced to commit a crime unless the prosecution can establish the person's predisposition to commit the crime. *See Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). The entrapment defense exonerates a defendant who engages in criminal behavior when the activity of government agents "implant[s] in the mind of an innocent person the disposition to commit the alleged offense and induce[s] its commission," *Sorrells v. United States, supra*, 287 U.S. at 442. But the defense of entrapment is not established simply because government agents "afford opportunities or facilities for the commission of the offense," *Sorrells v. United States, supra*, 287 U.S. at 441, or engage in "deceit." *United States v. Russell*, 411 U.S. 423, 435-36 (1973). The legal defense of entrapment is not established whenever a defendant is caught by a ruse.

Although the defense of entrapment was available to all seven appellants, none except Lederer elected to assert the defense at trial, or request a jury instruction on the issue. The defendants in the *Myers* and *Thompson-Murphy* trials made no attempt to avail themselves of the

limited opportunity a defendant has to defend on the dual grounds of non-involvement and entrapment, *see United States v. Valencia*, 645 F.2d 1158, 1170-72 (2d Cir. 1980) (amended 1981). They claimed only that bribery had not occurred, the *Myers* defendants on the ground that Myers was only "playacting,"—pretending to promise official action—and Thompson and Murphy on the ground that proof was lacking that they had accepted money for promises of official action. We do not doubt that when an entrapment defense is raised by evidence of inducement, either through cross-examination or affirmative evidence, a defendant is entitled to have a court assess, as with every other element of an offense, whether the record contains sufficient evidence from which a reasonable jury can conclude beyond a reasonable doubt, *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), that the prosecution has proved the defendant's predisposition to commit the offense. *See United States v. Valencia, supra*, 645 F.2d at 1167-68 (evidence of predisposition sufficient to create issue for jury). But a defendant is not entitled to a court ruling on the minimal sufficiency of the prosecution's evidence as to a defense that the accused has not placed in issue. A defendant's failure to assert an entrapment defense prevents the prosecution from responding to evidence of inducement by presenting evidence of the defendant's predisposition to commit the crime. We hold that a defendant who fails to assert entrapment as a factual defense at his trial, cannot assert it as a legal defense to his conviction. *See United States v. Bishop*, 367 F.2d 806, 809-10 (2d Cir. 1966).

Although Lederer, having asserted the defense of entrapment at trial, can challenge the sufficiency of the evidence of his predisposition, his claim is without merit. In seeking only $5,000 for himself out of the $50,000 he

received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement," *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971); *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933). The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

B. Excessive Government Role.

Appellants contend that even if the traditional entrapment defense fails, whether factually in Lederer's case or procedurally as to the other appellants, the conduct of Abscam violated standards of due process because the Government's role in the investigation was excessive and fundamentally unfair. Unlike the entrapment defense, which focuses on the defendant's predisposition, this due process claim focuses on the conduct of the government agents.[8] There are several strands to the argument. First, it is urged, the Government created the crimes. The elaborate contrivance of Abscam is claimed to extend beyon legitimate role of law enforcement in detecting cr into a forbidden area of instigating crime.

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[8] . pellants sometimes refer to this claim as "entrapment as a matter of law." We prefer to characterize it as a due process claim, leaving the phrase "entrapment as a matter of law" to describe the claim that, with respect to a traditional defense of entrapment, the evidence of predisposition was insufficient as a matter of law to permit the jury to find that the prosecution had proved predisposition as a matter of fact. Unlike the claim of entrapment as a matter of law, the due process claim of excessive governmental inducement is available to a defendant whether or not he asserted an entrapment defense at trial, since this claim is independent of evidence concerning predisposition.

Second, the appellants contend that the inducements offered to the Congressmen for their corrupt promises of official action were so excessive that a court should declare them to exceed limits claimed to inhere in the Due Process Clause. Third, appellants in the *Myers* case contend that the Government agents, notably Weinberg, "coached" Congressman Myers into committing the crimes by having Errichetti and Criden tell Myers what to say at the videotaped meetings and simultaneously assuring him that he need not intend to keep the promises he was making since he would never be called upon to deliver.

In assessing this collection of claims, we acknowledge the intimations in decisions of the Supreme Court and this Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates opportunities for criminal conduct in order to apprehend those willing to commit crimes. *See Hampton v. United States*, 425 U.S. 484, 491-95 (1976) (Powell, J., concurring); *United States v. Russell, supra*, 411 U.S. at 431-32; *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973); *see also Archer v. Commissioner of Corrections*, 646 F.2d 44, 46-47 (2d Cir.), *cert. denied*, 102 S. Ct. 291 (1981) (*Archer II*). At the same time, we recognize that, with the exception of a decision by a divided panel of the Third Circuit, *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement after the decisions of the Supreme Court in *Russell* and *Hampton* narrowed the availability of this defense. As the decisive concurring opinion of Justice Powell in *Hampton* stated, "Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." 425

U.S. at 495 n.7. Our own decision in *Archer II*, though questioning an extreme example of governmental initiation of a criminal opportunity, if not the crime itself, rejected the due process claim. 646 F.2d at 47. Moreover, as we recently observed in *United States v. Alexandro*, 675 F.2d 34 (2d Cir. 1982), an Abscam conviction of an employee of the Immigration and Naturalization Service, the due process claim, in the rare instances when successful, has prevailed to restrain law enforcement activities that involve coercion, *e.g.*, *Watts v. Indiana*, 338 U.S. 49 (1949), or outrageous violation of physical integrity, *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

1. *Instigation.* The appellants' claim of excessive governmental involvement in the instigation of criminal conduct is not supported by the facts. Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so.[9] Whatever may be the due process limit of governmental participation in crime, it was not reached here. *See Hampton v. United States, supra; United States v. Russell, supra; United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (*en banc*), *cert. denied*, 50 U.S.L.W. 3963 (U.S. June 7, 1982); *United States v.*

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[9] As Judge Pratt pointed out, Murphy's conduct is more accurately described as the taking of money, rather than a bribe, since the jury acquitted him of the bribery offense and convicted him of accepting an unlawful gratuity. 527 F. Supp. at 1225 n.14.

McQuin, 612 F.2d 1193, 1196 (9th Cir.), *cert. denied*, 445 U.S. 954 (1980); *United States v. Quintana*, 508 F.2d 867, 876-78 (7th Cir. 1975).

2. *Inducement.* Appellants contend that the size of the inducements offered to the Congressmen were excessive. They refer not to the $50,000 amounts of the bribes, but to the offers of financing multi-million dollar projects in the Congressmen's districts. We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. The argument is an affront to all the law-abiding Members of Congress and state officials who consider it a normal part of their public responsibilities to promote business activity for the benefit of their constituents. Moreover, if appellants are contending that there are due process limits on the size of an inducement that a government agency may offer and condition on acceptance of a bribe, the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

Thompson contends that inducement in violation of due process limits occurred in his case because the agents

persisted in offering money after his initial rejection on the morning of October 9, 1979. The claim is spurious. At the morning meeting Thompson did not reject a bribe, he rejected its payment under circumstances he feared would be incriminating. Then in the afternoon Criden met first with Amoroso and Weinberg and later with Thompson. At the meeting on the evening of October 9, what occurred was not unfair inducement, but simply the offering of money pursuant to an arrangement developed by Thompson and Criden whereby the bribe could be accepted while preserving what Thompson mistakenly thought would be deniability.

3. *"Coaching."* Appellants in the *Myers* case claim that excessive governmental activity, breaching due process limits, is to be found in the alleged conduct of Weinberg in "coaching" Myers to say falsely that he would introduce private immigration bills while assuring him that he would not be called upon to deliver on his promises. The claim is that Weinberg gave Errichetti and Criden the script for a charade that Myers would enact before the television cameras, and Errichetti and Criden then instructed Myers, in effect, how to obtain money under false pretenses.

In the District Court, Judge Pratt accepted, for purposes of these trials, the legal sufficiency of the "playacting" defense,[10] and afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the

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10 We suspect that this ruling reflects the not uncommon practice of district judges, faced with a defense claim of unquestionable legal validity in the course of protracted proceedings, to err on the side of caution and permit the defense to make its factual claim to a jury, rather than risk a reversal and retrial.

Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. In other words, the jury was to acquit on the bribery charge if they accepted the "playacting" defense. The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. Despite the existence of some evidence that Weinberg, through Errichetti and Criden, had encouraged the Congressmen to "come on strong," as Weinberg acknowledged in his testimony at the *Myers* trial, the jury was entitled to conclude that this was no charade. An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.

Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

However, circumstances in the record prompt us not to place this portion of our decision solely on the traditional deference an appellate court extends to the fact-finding of a jury and a trial judge when supported by sufficient evidence. The record contains one striking instance, in the early stages of Abscam, when Weinberg unquestionably

pursued a course of conduct with Senator Williams that reveals precisely the sort of "coaching" for "playacting" that some of these appellants claim occurred with them.[11] In a videotaped conversation with Senator Williams on June 29, 1979, Weinberg made these statements:

> He's only interested in you. You gotta tell him how important you are, who you are, what you can do and you tell him in no uncertain terms "without me there is no deal." "I'm the man. I'm the man who's gonna open the doors. I'm the man who' gonna do this and use my influence and I guarantee this." Follow me? All bullshit.
>
> . . . .
>
> And that's it, it goes no further, it's all talk, all bullshit. That's all he wants to hear it.
>
> . . . .
>
> It's . . . it's a walk-through. You should be out of there in twenty minutes.
>
> . . . .
>
> Come on, "Me, I'm the power." And that's it. It's as simple as that. You're on stage for twenty minutes.
>
> . . . .
>
> So you ready to go on-stage?

When this "coaching" session came to the attention of the office of the United States Attorney for the District of New Jersey, prosecutors there strenuously protested Weinberg's conduct and complained to Department of Justice officials and the prosecutors in charge of Abscam in the Eastern District of New York. That protest led to a meeting on August 9, 1979, at the home of Special Agent

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[11] We intimate no opinion with respect to the effect of this episode on Senator Williams' appeal from his conviction.

Larry Schneider of the FBI office in New Jersey, attended by Weinberg, prosecutors from the Eastern District of New York and the District of New Jersey, and FBI agents. What was said at that meeting was a matter of dispute at the due process hearing before Judge Pratt. FBI agent Martin Houlihan recounted an exchange between Edward Plaza, then an Assistant United States Attorney in New Jersey,[12] and Weinberg. According to Houlihan, Plaza told Weinberg that he could not put words into people's mouths; Weinberg replied "to the effect that if he didn't say things like that, then we wouldn't be making any cases." Agent Schneider supported Houlihan's account with the following testimony: at a meeting a few days later with Thomas P. Puccio, attorney in charge of the Organized Crime Strike Force in the Eastern District, Weinberg denied ever saying that he had "to put words in people's mouths or we won't make any cases," to which Schneider and Houlihan promptly replied, in substance, "Mel, that's not so, you did say that."

Schneider also testified that, when the Williams' "coaching" session was discussed at the August 9 meeting and Weinberg was admonished to refrain from such conduct, he (Schneider) made "a statement to the effect 'Yeah, at least if you're going to coach him you don't tape it.' " At the hearing, Schneider characterized this as a "joking remark," which "was said in a joking matter, as far as I understood everybody understood it to be a

12 Judge Pratt concluded that both Plaza and another Assistant United States Attorney from New Jersey, Edward Weir, were motivated to criticize the Abscam operation by jealousy over the control by prosecutors from the Eastern District of New York of an investigation uncovering corruption in the District of New Jersey. 527 F. Supp. at 1245-47. Professional rivalry may have been afoot, but our review of the record inclines us to think that Plaza and Weir were expressing in good faith concerns based largely on their sense of the proper administration of justice.

joking matter." To put it mildly, this is an odd subject for humorous bantering.

Not having heard the participants who testified about the August 9 meeting, we are in no position to assess credibility and decide whether Weinberg made the remark attributed to him. We note that Judge Pratt's discussion of the August 9 meeting does not make a finding of fact on this point. 527 F. Supp. at 1235. Judge Pratt did find that, by the time of the August 9 meeting, the Williams "coaching" incident was "past history, and the technique was not thereafter repeated." *Id.* This finding relates to whether Weinberg himself did any "coaching" of the Congressmen. It does not preclude the distinct possibility that Weinberg encouraged Errichetti and Criden to handle the "coaching" for him. Judge Pratt expressed the view that, if this happened, the Government bore no responsibility for whatever Errichetti and Criden might have told the Congressmen. *Id.* at 1735-37. If impropriety of constitutional dimension had arisen from Weinberg's "coaching," we would not be so certain as Judge Pratt that the taint would be dissipated by transmission through middlemen. *See United States v. Valencia, supra,* 645 F.2d at 1168-72); Note, *Entrapment Through Unsuspecting Middlemen,* 95 Harv. L. Rev. 1122 (1982).[13] There is a

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[13] Although there is room for fair dispute as to the circumstances in which government may be held responsible for extrapment by a third party, *see United States v. Valencia,* 645 F.2d 1158, 1176 (2d Cir. 1981) (Van Graafeiland, J., dissenting from denial of rehearing en banc), "the defense is available, of course, where government agents act through private citizens," *United States v. Buie,* 407 F.2d 905, 908 (2d Cir.), *aff'd on other grounds sub nom. Minor v. United States,* 396 U.S. 87 (1969); *see Lopez v. United States,* 373 U.S. 427 (1963); *Johnson v. United States,* 317 F.2d 127, 128 (D.C. Cir. 1963). Appellants' claim of indirect "coaching" presents the strongest circumstance for attributing third-party conduct to a government agent, since this is a claim of what might be called "instructed transmission" of an inducement: Weinberg, acting as agent for the Government, allegedly

substantial risk that Weinberg, having been admonished for "coaching" Senator Williams, and, even on the Government's version, having heard FBI agents and prosecutors "joke" about his not taping further "coaching" sessions, did decide to encourage Errichetti and Criden to undertake similar "coaching" ventures with the Congressmen.[14] Since we are left with at least a measure of unease as to whether some indirect "coaching" occurred, we prefer to consider the substance of appellants' claim.

(3)a. *"Coaching" and the "Playacting" Defense.* The appellants' "coaching" claim seeks to create a due process violation by combining an erroneous interpretation of the bribery statute with an unrealistic assessment of the facts. The first step in the argument is taken when the appellants contend that "playacting" is a defense to bribery. It is not.[15] Since Myers appears to be the first public official

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gave "coaching" directions to middlemen Errichetti and Criden with specific instructions that they should relay his directions to the Congressmen. The justification for holding government accountable for a middleman's behavior would be less compelling if the claim were one of "uninstructed transmission": a middleman takes it upon himself to pass an agent's inducement along to others. Government responsibility has been rejected where the circumstances showed what might be called "caused" inducement: an agent induces a middleman to commit a crime, and the middleman, responding to the pressure upon him, takes it upon himself to induce another person to participate in the crime. *E.g., United States v. Reed*, 526 F.2d 740 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976). *See generally United States v. Valencia, supra*, 645 F.2d at 1178 (explication of *Reed* facts).

14 At the Philadelphia due process hearing before Judge Fullam, Errichetti and Criden, testifying under an arrangement that precluded use of their testimony against them, both alleged that, acting at Weinberg's behest, they had told the Congressmen that money could be obtained simply by pretending to give assurances of using Congressional influence.

15 Appellants have no basis for complaint because Judge Pratt gave them an opportunity, accepted by defendants in the *Myers* trial, to try to persuade the jury that the facts supported a defense to which they were not entitled.

in a reported federal decision to defend a bribery charge on the ground that he intended to keep the bribe but not to keep the promise he made to the bribe-payer,[16] it is not surprising that the appellate reports have not dealt explicitly with the claim. The statute proscribes the corrupt receipt of money by a public official "in return for: (1) being influenced in his performance of any official act. . . ." The phrase "in return for" appeared in the statute in 1962 when Congress revised and consolidated various public corruption statutes. This phrase makes it clear that bribery under section 201(c) requires a promise of a future act in exchange for the money given to the public official, an element not required for receipt of an unlawful gratuity under section 201(g), which punishes receipt of a gratuity paid "for or because of" performance of a future or past official act. *United States v. Niederberger,* 580 F.2d 63, 68-69 (3d Cir.), *cert. denied,* 439 U.S. 980 (1978); *United States v. Brewster,* 506 F.2d 62, 71-72 (D.C. Cir. 1974). As the Supreme Court said in *United States v. Brewster, supra,* 408 U.S. at 526, construing the bribery statute, "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way." But the text of the 1962 revision perpetuates the preexisting ambiguity as to whether the promise given by the public official must be one that he intends to carry out. A prior statute, 18 U.S.C. § 205 (1958), had required that a Congressman receive the bribe "with the intent to

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16 Cases have considered and rejected the somewhat similar defense that the bribe-taker was unable to be influenced because the official act for which the bribe was paid either was beyond his authority, *see, e.g., United States v. Carson,* 464 F.2d 424, 433 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972); *United States v. Heffler,* 402 F.2d 924 (3d Cir. 1968); *cert. denied,* 394 U.S. 946 (1969), or had already been taken, *see, e.g., United States v. Arroyo,* 581 F.2d 649, 653-57 (7th Cir. 1978), *cert. denied,* 439 U.S. 1069 (1979).

have his action . . . influenced." This somewhat awkward phrasing left it unclear whether the Congressman must intend to take action or need only intend to receive money with awareness of the purpose for which the briber gives it.

The present version, as revised in 1962, deletes "intent" from the description of the conduct specifically proscribed, and instead requires that the overall offense be committed "corruptly." The specific conduct is rephrased as receipt of money in return for "being influenced" in official actions. The meaning of the new language (and probably that of the prior language as well) is clarified by the report of the House Committee on the Judiciary:

> The language used in subsection (c) [of section 201] emphasizes that it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality. Some courts have given this intepretation to the present section 202.[17] (See, e.g., *Woelfel v. United States*, 237 F.2d 484, 488; *Whitney v. United States*, 99 F.2d 327, 331.)

H.R. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). Thus, "being influenced" does not describe the Congressman's true intent, it describes the intention he conveys to the briber in exchange for the bribe. The citation in the House Report to the *Whitney* decision underscores the point. On the page of the *Federal Reporter* to which the

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[17] Section 202 of Title 18, as it read before the 1962 revision, proscribed acceptance of bribes by various officials of the United States. Using language similar to former section 205, covering receipt of bribes by Members of Congress, section 202 proscribed receipt "with intent to have his decision or action . . . influenced thereby." 18 U.S.C. § 202 (1958).

Report refers appear these sentences (and no others of consequence):

> The evidence shows that [the public official] not only took but solicited money in connection with said sales, and whether his action was influenced is immaterial. The money was solicited and taken for the purpose of causing [the people who paid the bribe] to believe that they would get more consideration than they would otherwise.

Whitney v. United States, 99 F.2d 327, 331 (10th Cir. 1938). As the Seventh Circuit has said, in rejecting a claim that a bribe was not received in return for being influenced because the event requiring influence had already occurred, "The phrase ['in return for'] brings into play the purpose of the bribe and thus the mind of the bribe-payer." *United States v. Arroyo*, 581 F.2d 649, 654 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979). Construing a similar statute proscribing receipt of money for the promise of a public office, 18 U.S.C. § 215 (1952) (a predecessor of 18 U.S.C. § 201 (1976)), the Supreme Court upheld a conviction despite the fact that the public office, though authorized, was not in existence. *United States v. Hood*, 343 U.S. 148 (1952). "Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption." *Id.* at 151. With respect to the bribery statute, we believe the defense of fraud is equally unavailable.[18] If Myers was "playacting"

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[18] This construction of the statute is especially appropriate when the public officials who receive bribes are Members of Congress, since the Speech or Debate Clause bars evidence of their subsequent official action or the reasons for it, *United States v. Johnson*, 383 U.S. 169 (1966), evidence that would frequently be highly probative of whether, at the time of the bribe, the Member intended to take official action. It

and giving false promises of assistance to people he believed were offering him money to influence his official actions, he violated the bribery statute.[19]

3(b). *"Coaching" as Inducement.* With the statute thus understood, the "coaching" claim does not provide a legal defense simply because some "coaching" may have occurred; the claim would have merit only if there were insufficient evidence of the defendants' predisposition to "playact" or if the agents' conduct were so extreme as to exceed due process limits. We have already ruled that the entrapment defense is without merit in Lederer's case and is procedurally unavailable to the other appellants because they elected not to assert it at trial. The entrapment defense fares no better when the appellants shift their focus from the size of the inducements to Weinberg's alleged suggestion of a script. Prompt acquiescence shows predisposition to accept a bribe, whether or not a promise of official action is intended to be kept.

Thus, appellants are left with a claim that the "coaching" was so outrageously coercive as to violate due process, wholly apart from the traditional defense of entrapment. The record does not remotely support the

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is unlikely that Congress, aware of the special protection its Members enjoy under the Speech or Debate Clause, included in the offense of bribery an element for which the Clause insulates the pertinent evidence.

19 We recognize that some opinions have described the bribery statute in language that can be read to suggest that the bribe-taker must intend to take the promised official action. *See United States v. Brewster*, 506 F.2d 62, 70-76 (D.C. Cir. 1974); *United States v. Irwin*, 354 F.2d 192, 195-96 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). We do not give controlling weight to such dicta, since they were expressed without any need to consider the bizarre defense that the bribe-taker did not intend to keep his corrupt promise. Consequently, the opinions had no occasion to discuss the 1962 House Judiciary Committee Report, which is so pertinent to the claim in this case.

claim. Even if all of the appellants' evidence is credited, a generous assumption that strains credulity, it shows at most that Errichetti and Criden, perhaps prompted by Weinberg, laid out before each Congressman a scheme for pocketing $50,000 by falsely promising to introduce private immigration bills. Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States v. Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). Whatever conduct might transgress the standard outlined in *Hampton* and *Russell*, the facts of the Abscam investigation are not even close to the line. *United States v. Alexandro, supra; United States v. Jannotti, supra.* The bare suggestion to a Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of "outrageous" behavior. The public has the right to expect that their public officials have sufficient integrity not to capitulate at such a suggestion. Whatever the public's expectation, the record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

C. Impairment of Accurate Fact-Finding.

Appellants allege that the conduct of the Abscam investigation denied them due process for a variety of

reasons that are combined in support of a broad claim that the Government prevented the presentation to the jury of an accurate account of the events. With the exception of traditional arguments that exculpatory evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the due process foundation of this general area of attack is more the product of resourceful argument than precedent. To be successful, this attack must overcome our well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation. *See United States v. Brown*, 602 F.2d 1073 (2d Cir.), *cert. denied*, 444 U.S. 952 (1979); cases cited *id.* at 1076-77. It might be thought that the specific constitutional guarantees concerning criminal procedure, *e.g.*, the Confrontation Clause of the Sixth Amendment, and the Federal Rules of Evidence provide sufficient standards for determining the quality of evidence appropriate to support a finding of guilt. Yet the Due Process Clause, with its principle of constitutionally required fairness, has been applied to develop minimum standards concerning the accuracy of evidence, notably in the area of eyewitness identification testimony. *See Manson v. Braithwaite*, 432 U.S. 98 (1977); *Stovall v. Denno*, 388 U.S. 293 (1967). Appellants invite us to frame comparable standards for undercover investigations.

1. *Deliberate Ambiguity.* An interesting component of the argument, advanced by Thompson and Murphy, maintains that when the Government is in control of an undercover operation, as contrasted with merely observing events in which no governmental agent is involved, due process requires the investigators to eliminate or at least minimize ambiguities in the critical events that form the basis of the criminal offense. Otherwise, they contend, the Government needlessly creates risk of erroneous

fact-finding by the jury on the ultimate issue of guilt or innocence. Relating the claim to these cases, they argue that an undercover offer of a bribe must be expressed in terms that leave no uncertainty that money is being transferred to a Congressman and that it is being paid to influence his official actions. As counsel for Murphy contends, "Congressman Murphy was denied the opportunity to say 'no,' [*see Myers I, supra,* 635 F.2d at 939] because the Government did not clearly convey its invitation to corruption." (Murphy Br. 50.)

Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness. Wherever those limits might be, they have not been crossed in these cases. Undercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. *Cf. United States v. Reynoso-Ulloa, supra,* 548 F.2d at 1338-39. They need not say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action."

In the *Myers* and *Lederer* cases, the bribe offers created no risk of ambiguity. There were ample references to money and to its payment in exchange for assistance with private immigration bills, and both Myers and Lederer directly received envelopes filled with cash under circumstances leaving no doubt as to their knowledge of the contents. The episodes involving payments to Thompson on October 9 and to Murphy on October 20 are somewhat more ambiguous. Although the events and conversations at those meetings are captured on videotape, the sights and sounds, considered in isolation, create fair questions of fact as to whether Thompson and Murphy knew that

money was in the briefcase, and whether the money was received by the Congressmen. Both Congressmen contend that they did not know that the briefcase contained cash and that on both occasions Criden received the briefcase and did not share its contents with either Thompson or Murphy.

Whatever ambiguity arises from the manner in which the bribes were offered at the meetings on the evening of October 9 and on October 20 is directly attributable to the cautious ground rules insisted upon by Criden and Thompson in the hope of insulating Thompson and those he recruited from culpability. It is plainly inferable from the taped conversations of the three meetings on October 9 that Thompson arranged to have the cash transferred without explicit references to it, apparently in the forlorn hope that if any of his trusted companions ever appeared on a witness stand to accuse him, he could escape conviction by recounting how he had told the group that he did not want cash and had left the meeting without any money. The permissible, if not the irresistible, inference the jury could draw from the series of conversations on October 9 was that Thompson was not rejecting money; he was carefully orchestrating how to accept it with feigned innocence. The evidence supported a finding that Thompson and Criden, recognizing that those offering bribes understandably want some indication that the Congressman they have bought is aware of the purchase, worked out a scenario whereby Thompson would acknowledge receipt with only the oblique comment to Criden, "You look after that for me will you?" That formula, the jury could find, would surely satisfy the bribe-givers that Thompson was acknowledging receipt, while preserving his opportunity, if the occasion ever

arose, to claim at a trial, as he did, that he thought the briefcase contained investment proposals.

The transaction on October 20, which formed the basis for the substantive offenses of which both Thompson and Murphy were convicted, followed the same pattern Criden and Thompson had developed and used for the evening session on October 9. The evidence shows that Thompson and Criden had explained their ground rules to Murphy. A recorded telephone conversation between Criden and Weinberg on October 17 contained these passages:

> Weinberg: Now, you gonna lay those ground rules to Murph, right?
>
> Criden: Oh yeah. No problem.
>
> . . . .
>
> Criden: I am going to have lunch with this guy, with Murphy. And I am gonna make sure he understands clearly. . . .
>
> . . . .
>
> Criden: I've got to coach these guys. I've got to make them feel at ease.
>
> . . . .
>
> Criden: I gotta stroke him, you know, uh, make him feel comfortable.
>
> Weinberg: They all got that problem, they're nervous.
>
> Criden: They're all nervous. You know, they all figure that maybe it's a set up, you know.
>
> . . . .
>
> Weinberg: Thompson must have spoken to him, huh.
>
> Criden: Yeah, naturally.

The caution displayed by Thompson and Murphy permitted them a chance to confront the jury with a contestable question of fact. The jury, asked to determine the factual question of whether Thompson and Murphy knowingly took money while seeking to minimize the incriminating nature of their own words and conduct, saw through the ploy. Facing the legal issue of whether the investigators' bribe offer was unfairly obscured, we are equally unmoved. The agents did not violate due process limits by observing the defendants' ground rules.

Murphy further contends that there is a First Amendment dimension to the due process claim of deliberate creation of ambiguous facts. The ambiguities of what occurred on October 20, he suggests, blur the line that must be maintained between unlawful conduct that violates criminal statutes and lawful conduct, protected by the First Amendment, that occurs when a Congressman discusses legislative action and assistance with his constituents. Reliance is placed on cases such as *United States v. O'Brien*, 391 U.S. 367 (1968), and *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

This First Amendment claim is untenable. Unlike *O'Brien*, there is no issue in these appeals whether conduct arguably protected by the First Amendment as expression is nonetheless being punished. "[I]t is *taking* the bribe [or an unlawful gratuity], not performance of the illicit compact, that is a criminal act." *United States v. Brewster, supra*, 408 U.S. at 526 (emphasis original). Nor do these appeals present the issue, illustrated by *Spock*, whether a lawful objective was pursued by lawful or unlawful means. *See United States v. Spock, supra*, 416 F.2d at 169. In some circumstances a prosecution of a Congressman for bribery can present a close question as to whether money was received as an illegal bribe or a

lawful campaign contribution; in such cases, the jury must be carefully instructed as to the distinction, and the evidence must show "specific knowledge of a definite official act" for which payment is made. *United States v. Brewster, supra,* 506 F.2d at 81. But none of these Congressmen claimed that he had received what he thought was a campaign contribution.[20] Murphy's point is that, at least in his case, there was an undue risk that the jury might convict him simply for engaging in the normal congressional activities of meeting with people who might invest in his district and advising people on immigration matters. That risk was adequately met by Judge Pratt's instructions, which focused the jury's attention squarely on whether Murphy knew that there was money inside the briefcase transferred on October 20 and whether Murphy received that money. The First Amendment claim cannot obscure the fact that Murphy accepted Thompson's invitation to accept money unlawfully under an arrangement that they both mistakenly believed would yield insufficient evidence of their guilt. The risk of a mistaken conviction is adequately protected by scrutizing the sufficiency of the evidence on which a jury is permitted to find guilt beyond a reasonable doubt.

2. *Conduct of the Investigation.* Appellants' remaining challenges to the accuracy of the Government's proof require little discussion. They voice a chorus of indignation that the Government would employ the services of such an untrustworthy person as Weinberg, and they fault the FBI agents and prosecutors for not subjecting Wein-

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20 Though Lederer was quoted by Cook as saying he would be satisfied with only a $5,000 campaign contribution from his lawyer friends out of the $50,000 payment, he made no claim at trial that he thought the sheik's representatives were making a donation to his campaign. His sole defense was entrapment.

berg to more exacting supervision and for compensating him too generously. They challenge Weinberg's failure to record all of his conversations with all of the defendants and his loss and erasure of some audio tapes. They urge that in various respects the entire investigation failed to conform to internal guidelines of the Department of Justice promulgated by former Attorney General Edward Levi.

The use of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called, but the Due Process Clause does not forbid their employment, detail their supervision, nor specify their compensation. Weinberg's rewards, both in cash and in lenient treatment for his 1977 fraud conviction, were fully explored with the jury. Though the appellants claimed that he was induced to lie by offers of contingent payments for making cases, the District Court found no such arrangement. 527 F. Supp. at 1240. No doubt Weinberg did not record every conversation with every defendant, but hundreds of audiotapes were made, in addition to the videotaping of all the meetings with the Congressmen. Despite the appellants' dark insinuations, the evidence fully justified Judge Pratt's findings that on one occasion a few audiotapes were stolen from Weinberg's flight bag and on other occasions, Weinberg recorded over and thereby erased previously taped conversations that were unimportant. *Id.* at 1231. There was conflicting evidence, considered by the jury, as to whether on another occasion a tape gap was the result of accident, as Weinberg claimed, or deliberate manipulation, as a defense witness claimed. In no instance can defendants point to any unrecorded conversation or portion of a conversation that would have added anything of significance to their defenses. Non-compliance with internal

departmental guidelines is not a ground for complaint. *United States v. Caceres*, 440 U.S. 741 (1979).

3. *Brady Claims.* Appellants contend that various items were not disclosed to them until after the completion of the jury trials, items that they claim were exculpatory and required to be disclosed under the rule of *Brady v. Maryland, supra.* Many of the claims concern items that would allegedly have bolstered the attack upon the credibility of Weinberg. Judge Pratt properly placed these claims in perspective when he noted the abundant grounds available to the defendants at trial to impeach Weinberg's credibility:

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

527 F. Supp. at 1248.

In any event, the claims are without merit. Criden points to evidence he contends would have buttressed his claim that Weinberg had received and had falsely denied receiving a $350 microwave oven and other gifts from Errichetti. The prosecution had sought to support Weinberg's credibility with evidence that he had promptly turned over to FBI agents three $6,000 gold watches given him by George Katz, a defendant in another Abscam case. At the *Myers* trial, Weinberg testified that he told the agents about the watches after he received them. What Criden now complains of is the late disclosure of a

memorandum indicating that Weinberg had told the agents about the watches even prior to his receipt of them. Whenever he mentioned them, the Government's point remains that Weinberg was not likely to conceal a $350 gift when he had been forthcoming about an $18,000 gift. Lederer complains that not until after his trial did he obtain the transcript of the August 9, 1979, "coaching" session involving Weinberg and Senator Williams and other documents revealing criticism by the New Jersey prosecutors of Weinberg's tactics. In fact, Lederer did receive, prior to trial, a lengthy memorandum in which a senior Department of Justice official summarized the criticism from the New Jersey prosecutors and much of the basis for their criticism. Armed with this memorandum, Lederer called two New Jersey prosecutors as defense witnesses to testify about the August 9 session. Moreover, Lederer's defense was entrapment, not "play-acting." Thompson claims he could have bolstered his attack on Weinberg's credibility if he had been given Weinberg's testimony at the "due process" hearing in Philadelphia before Judge Fullam, in which Weinberg falsely denied having been cautioned, after the August 9 session, not to coach potential defendants. The falsity of this denial was not relevant to any testimony Weinberg gave at Thompson's trial. Thompson made no claim that he had been "coached" into making false promises to help the sheik. Moreover, like all the defendants, he had abundant grounds on which to attack Weinberg's credibility. None of these claims, nor any of the other alleged *Brady* violations, which we do not detail, remotely provides a basis for any relief.

* * * * *

Having considered all of appellants' claims that the investigation violated the standards of the Due Process

Clause, we conclude that the conduct of the Abscam operation did not deny any appellant a constitutionally protected right.[21] Appellants contend, nevertheless, that we should assess the conduct of the government agents under more exacting standards than those of the Due Process Clause and dismiss the indictments in the exercise of our supervisory power over the administration of criminal justice. Whatever the scope of that authority in the aftermath of *United States v. Paynor,* 447 U.S. 727 (1980), it does not permit courts to fashion their own "sub-constitutional" limitations on the conduct of law enforcement agents. Prior to *Paynor,* the supervisory power was used to fashion and enforce rules for judicial proceedings in order to safeguard important constitutional rights. *See, e.g., United States v. Mohabir,* 624 F.2d 1140, 1151-53 (2d Cir. 1980) (right to counsel); *United States v. Hinton,* 543 F.2d 1002, 1010 (2d Cir.) (self-incrimination), *cert. denied,* 429 U.S. 980 (1976). And, on infrequent occasions, the power was used to discipline prosecutorial irregularities, particularly in front of grand juries. *See United States v. Jacobs,* 531 F.2d 87 (2d Cir.),

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21 Some of the appellants contend that venue was improperly laid in the Eastern District of New York. They acknowledge that significant events occurred in that District, notably the payments to Myers, Lederer, and Murphy, the last of which was shared with Thompson. The claim is that venue was "manufactured" in the Eastern District for ulterior reasons, primarily to enable the Eastern District prosecutors to handle the trials. In *United States v. Archer,* 486 F.2d 670 (1973), we rejected the Government's attempt to create federal jurisdiction by luring a defendant into placing a telephone call across a state line. We do not preclude the possibility of similar concerns if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue. Here, the key events occurred in the Eastern District of New York, and the Government cannot be faulted for selecting hotels near Kennedy Airport as the site for transactions involving Congressmen from New York, New Jersey, and Pennsylvania.

vacated mem., 429 U.S. 909, *reinstated*, 547 F.2d 772 (2d Cir. 1977), *cert. dismissed*, 436 U.S. 31 (1978). It has not been used as a general corrective authority over the conduct of criminal investigations, and, in light of *Paynor*, its scope is surely not to be expanded. Appellants are entitled to no more from the courts than a testing of Abscam against constitutional standards.

IV.

We consider next a series of claims that arise in one or another of the three trials.

A. *Myers* Trial

1. *Sufficiency of Evidence.* Criden and Johanson both challenge the sufficiency of the evidence to establish that they knew the purpose for which the money was paid to Myers. The record shows their awareness at the early stages of the plan; their law partner, Cook, testified that after the meeting on the yacht, Criden and Johanson told him about the sheik's concern for asylum in the United States and that payment to Congressmen would assure a "friendly face" who "owed him a favor" and would "help" him. Criden's claimed assurance that the Congressmen would never have to do anything does not lessen his and Johanson's knowledge that the money was being corruptly received for a promise to be influenced concerning official action, whether or not the promise was intended to be kept. Criden's attendance at and participation in the January conversations with Myers in Philadelphia leave no doubt whatever of his knowledge. Johanson's knowledge was fairly inferable by the jury from his initial hearing of the plan, his recruitment of Myers, his receipt of cash, and his acknowledgment to the FBI

that he had had many sleepless nights but had not been able to resist the chance to make some easy money. This non-hearsay evidence of Johanson's culpability justified the admission against him of the acts and declarations of the co-conspirators. *See United States v. Mastropieri*, No. 81-1017 (2d Cir. July 20, 1982), slip op. 4011-21.

2. *Evidentiary Ruling.* The *Myers* appellants contend that it was error to admit into evidence the January, 1980 conversations that Myers and Criden had with undercover agents Wald and Haridopoulos at the Barclay Hotel in Philadelphia. In these conversations Myers demanded an additional $35,000 to bring his share up to the $50,000 he had expected to receive from the August 22, 1979, meeting; he also discussed possible investments by the sheik that would provide a justification for his assistance with immigration matters. Appellants contend that these conversations were evidence of other crimes occurring after the end of the conspiracy concerning the August 22 payment and were inadmissible under Feb. R. Evid. 404(b). The argument builds upon the ruling Judge Pratt made when the evidence was offered. Anxious to keep the jury's attention focused on the August 22 episode, Judge Pratt told the jury that the January conversations were "outside the conspiracy charged in the indictment" and should be considered as acts and statements "only against the defendant who made them." In fact, the conversations, illuminating the nature of the conspiracy and occurring while the conspiracy was still in existence, were fully admissible against all defendants. Judge Pratt's limiting instruction, as he recognized, was unduly favorable to the defendants and affords them no basis to complain.

3. *Jury Instructions.* Criden levels several attacks upon the charge in the *Myers* trial, none of which has

merit. It was not error for the District Court to decide the appellants' due process claims, without submitting them to the jury. *United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980). In a general observation in the portion of the charge concerning witness credibility, Judge Pratt told the jury that they may consider a witness's prior "failure to disclose information, when the opportunity to do so presented itself." Criden apprehends that the jury may have taken this as permission to draw an adverse inference from Myers' silence during the course of an interview with FBI agents. This portion of the charge was not directed at Myers, the jury was not told that Myers had exercised his right to remain silent during the interview, and in any event, Myers' failure to give his version of the facts was probative since he had elected to make statements to the agent before deciding to end the interview. *See Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam). It was not improper to refer to Weinberg as an "informer," and the charge adequately cautioned the jury concerning his testimony. Finally, it was surely not prejudicial error, if error at all, to omit the requested instruction that the jury may infer that tapes and unrecorded portions of tapes not produced by the Government would be unfavorable to the prosecution if the jury found that such tapes or portions "could" have contained pertinent material. The failure to record all conversations and all portions of taped conversations and the dispute concerning whether Weinberg had purposely erased two tapes of conversations with Errichetti were fully argued to the jury.

B. *Lederer* Trial.

1. *Evidentiary Ruling*. Lederer contends that evidence was introduced at his trial in violation of the

Speech or Debate Clause. He objects to the admission of his annual financial disclosure statement, filed with the Clerk of the House of Representatives pursuant to the Ethics in Government Act of 1978, 2 U.S.C. § 701 *et seq.* (Supp. IV 1980). In that statement Lederer falsely listed his $5,000 share of the bribe as a "consulting fee" from Johanson. The financial report was not shielded by the Speech or Debate Clause. Though the Clause, in covering "legislative acts," *Gravel v. United States*, 408 U.S. 606, 625 (1972), extends beyond words spoken during legislative debate, any other matters it reaches "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . ." *Id.* Disclosure of income from sources other than employment by the United States, *see* 2 U.S.C. § 702(a)(1)(A), is no part of such "deliberative and communicative processes." *Cf. Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (newsletters and press releases); *United States ex rel. Hollander v. Clay*, 420 F. Supp. 853 (D.D.C. 1976) (Congressional travel vouchers). Prosecutions for falsification of similar statements indicate that Lederer's financial disclosure statement was not shielded. *See United States v. Bramblett*, 348 U.S. 503 (1955) (prosecution for false statement to House Disbursing Office); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979) (prosecution for false statement to House Office of Finance), *cert. denied*, 446 U.S. 982 (1980).

2. *Jury Instructions.* Lederer's two objections to the charge are without merit. It was not error for Judge Pratt to explain "predisposition" by asking the jury to determine whether the defendant was "ready and willing" to commit the crimes charged whenever a favorable opportunity arose. *United States v. Sherman*, 200 F.2d 880, 882

(2d Cir. 1952). Lederer would have preferred an explanation that required finding a "previous intent or purpose," as some courts have phrased the test, *e.g.*, *United States v. Karas*, 624 F.2d 500, 503 n.2 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). In this Circuit, the "ready and willing" phrase has been repeatedly used. *E.g.*, *United States v. Martinez-Carcano*, 557 F.2d 966, 969-70 (2d Cir. 1977); *United States v. Rosner*, 485 F.2d 1213, 1222 nn.11 & 12 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Braver*, 450 F.2d 799, 801 n.4, 805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972). The jury need not find that the defendant consciously considered committing the crime before the opportunity arose, only that he was predisposed to accept the opportunity presented to him, *i.e.*, of a frame of mind that made him "ready and willing" to commit a crime, even on the first occasion that he may have considered it.

Nor was it improper to tell the jury, in the course of explaining that the defendant has no obligation to present any evidence, that a defendant has the power to subpoena witnesses. This phrase prompted no objection at trial, and cannot be raised on appeal. In any event, there is no merit to Lederer's suggestion that the jury might have mistakenly thought he could have called Errichetti, Criden, and Johanson to support his entrapment claim. Having failed to subpoena his severed co-defendants, Lederer cannot assume that their testimony was not available to him. *Cf. United States v. Wright*, 588 F.2d 31, 36 (2d Cir. 1978) (failure to subpoena witness precludes claim that lack of use immunity for the witness created prejudice), *cert. denied*, 440 U.S. 917 (1979).

C. *Thompson-Murphy* Trial

1. *The "Impossibility" Defense.* Thompson contends that the indictment against him fails to state an offense on the theory that the fictional nature of the "sheiks" and their immigration problems renders the crime of bribery, as alleged in the indictment, impossible of performance. The "impossibility" defense has been a matter of conflicting views. *Compare People v. Jaffe,* 185 N.Y. 497, 78 N.E. 169 (1906) (defense upheld as to a "fence" who bought goods from a police informant that were not in fact stolen), *and State v. Guffey,* 262 S.W.2d 152 (Mo. App. 1953) (defense upheld as to a hunter who shot a stuffed deer placed as a decoy by a game warden), *with People v. Rojas,* 55 Cal. 2d 252, 358 P.2d 921 (1961) (rejecting defense as to a "fence" who bought goods not in fact stolen). Federal courts have upheld the defense when the crime charged had not in fact occurred, even though the defendant thought it had. *E.g., United States v. Oviedo,* 525 F.2d 881 (5th Cir. 1976) (sale of uncontrolled substance incorrectly believed to be controlled substance); *United States v. Berrigan,* 482 F.2d 171 (3d Cir. 1973) (transmittal of letters to prison inmate incorrectly believed to be without warden's knowledge).

The claim is unavailing here for the basic reason that the crime charged did occur. The indictment charged and the evidence established that Thompson received a bribe in return for his corrupt promise to take official action. That suffices to constitute a violation of § 201(c). *United States v. Brewster, supra,* 408 U.S. at 525-26. Whether the promise was carried out is irrelevant, *id.* at 527, and it is no defense that the promise could not have been carried out either because the official act to be taken was beyond the defendant's authority, *United States v. Carson,* 464

F.2d 424, 433 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States v. Heffler*, 402 F.2d 924 (3d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969), or had already been taken, *United States v. Arroyo, supra*, 581 F.2d at 653-57; *cf. United States v. Rosner, supra*, (18 U.S.C. § 201(b), punishing the bribe-payer, is violated whether or not purpose of the bribe is capable of attainment); *United States v. Jacobs, supra*, 431 F.2d at 759 (same).[22] Neither is it a defense that the public official will not be called upon to take official action because of the fictitious nature of the person alleged to be seeking assistance. "Official act" is defined as action on any matter that "may at any time be pending" before a public official, 18 U.S.C. § 201(a). Introducing a private immigration bill qualifies as an "official act," whether or not the beneficiary of such a bill is a real person. It was not necessary for the investigators to continue Abscam to the point of having bills introduced, conduct that would, in any event, have been immunized by the Speech or Debate Clause. *See United States v. Johnson*, 383 U.S. 169, 180 (1966).

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[22] Thompson relies on *United States v. Reisley*, 35 F. Supp. 102 (D.N.J. 1940), in which Circuit Judge Maris, sitting in the District Court, upheld a defense to an indictment charging violation of 18 U.S.C. § 203 (1934), a conflict of interest statute that preceded 18 U.S.C. § 281 (1958) and 18 U.S.C. § 203 (1976). An employee of the Veterans Administration had received money for promising to effect an increase in the payor's benefits. In fact, the increase had already occurred without any action by the defendant. *Reisley* viewed the offense as accepting payment for services rendered, and acquitted the defendant since in fact services had not been rendered. Even if that decision is correct as to a conflict of interest violation, its force as applied to a bribery violation is negated by the explicit Congressional recognition, expressed by the House Committee on the Judiciary when the current bribery statutes were revised in 1962, that "it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality." H. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). The House Report cited approvingly to *Whitney v. United States*, 99 F.2d 327, 331 (10th Cir. 1938), which had construed an early bribery statute, 18 U.S.C. § 207 (1934), contrary to *Reisley*'s view of a conflict of interest statute.

2(a). *Jury Instructions — Element of Receipt.* Thompson and Murphy both challenge portions of the jury instructions. One claim, applicable to all of the substantive counts, attacks Judge Pratt's supplemental instruction, in response to a jury inquiry, concerning the element of receipt of illegal payment. Understanding the claim requires some elaboration of the pertinent circumstances. The counts of the indictment charging violations of bribery, unlawful gratuity, and conflict of interest all alleged receipt of money between October 10, 1979, and February 2, 1980. The Government's theory of the *Thompson-Murphy* case was that the substantive offenses committed by both Thompson and Murphy arose out of the October 20 transaction involving Murphy and Criden, not the October 9 transaction involving Thompson and Criden. In its bill of particulars the Government alleged that the $50,000 cash payment "was received by Criden and Murphy on October 20, 1979 . . . . Criden left the meeting in physical possession of the money. The date on which and the place where Murphy took physical possession of his share of the payment is [*sic*] unknown." In charging the jury initially with respect to the "receipt" element of Count Two, the bribery offense, Judge Pratt focused the jury's attention on the issue of whether either defendant had received a share of the $50,000 *after* the October 20 meeting: "It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20th was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both." (Emphasis added.) The jury was told that this "receipt" element also applied to the unlawful gratuity and conflict of interest counts, and that a defendant who

did not receive part of the money must be acquitted on all the substantive counts.

The jury's first inquiry on this issue read as follows:

> Your Honor, If this question is in order—
>
> If the briefcase was under the control of but not in the physical possession of the defendant Murphy, does [*sic*] that, under your charge, be considered "for the benefit of an eventual reception by defendant Murphy or defendant Thompson or both?["]

Judge Pratt apparently thought that the jury mistakenly understood that Murphy's possession of the briefcase at the October 20 meeting was a required aspect of a finding of receipt by him. He therefore gave a supplemental instruction that included the following:

> In specific answer to your question, as I interpret it, actual possession of the briefcase itself by Murphy would not have to be shown before you could determine that he later received part of the money.

The correctness of this response is not challenged on appeal. It soon became apparent that the jury had not wondered whether Murphy's actual possession on October 20 was required; they were making the more trenchant inquiry as to whether his constructive possession on that date was sufficient. Their subsequent note read as follows:

> Your honor:
>
> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.

> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*["] receiving the money at some later time? [Emphasis original.]

This inquiry provoked an extended colloquy between Court and counsel. Murphy contended that the inquiry should be answered with a simple "no," arguing that any other response would unfairly alter the Government's theory of how the offense occurred. This concern was heightened when the prosecutor, in urging that the proper response was "yes," pointed out that the bribery statute is violated when a public official receives anything of value either "for himself or for any other person or entity." Ultimately, Judge Pratt decided to steer a middle course, rejecting a "no" answer and also rejecting the Government's effort to permit the jury to convict Murphy on the theory that he was merely seeking to confer a benefit upon Criden. Instead, Judge Pratt kept the jury's attention focused on the crucial element of whether money was received by Murphy and for his benefit, but permitted the jury to consider whether receipt by Murphy was established by his words and conduct at the October 20 meeting. First, he reminded the jury to focus on the essential element of count Two, which he summarized as being "that on or shortly after October 20, 1979, the defendant received a sum of money." He then endeavored to paraphrase the jury's inquiry and respond to it:

> When I said in the charge it is for you to determine based upon all the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20th, was *for the benefit and*

> *eventually received* by the defendant Murphy, or defendant Thompson, or both, when I use the term "eventually," there did I really mean eventually and not then, October 20th[?]
>
> And my answer to that is[:] you in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what the circumstances were, and determine from that whether the defendant Murphy received the money. [Emphasis added.]

Since the major factual dispute framed by Murphy's cross-examination and summation was whether Murphy had any knowledge that money was in the briefcase, Judge Pratt emphasized that the element of receipt could not be established unless the jury found that Murphy knew that money was in the briefcase. He then recapitulated his response in these words:

> So my final answer to your question is: If you are talking simply about the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of money on or shortly after October 20, 1979, as that set forth in the element one of Count 2.

Significantly, the only criticism voiced by counsel after hearing the supplemental instruction was to request that one sentence of the response might have been misunderstood as altering the Government's burden of proof as to knowledge. Judge Pratt promptly recalled the jury and reemphasized, as he had when the inquiry was first answered, that the burden to prove Murphy's knowledge of the money beyond a reasonable doubt rested upon the Government.

The supplemental instruction presents no ground on which either Murphy or Thompson may now complain.[23] Judge Pratt's response did not alter the requirement that the money be received for the benefit of the defendant.[24] Limiting himself to the precise point raised by the jury, he broadened only the temporal aspect of receipt. He permitted a finding of receipt not only at some point after October 20 but also at the time of the October 20 meeting. This permitted the jury to find that Murphy had constructively received the money for himself on October

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23 Complaint is also made that Judge Pratt did not adequately alert counsel to his proposed response before giving it to the jury. *See United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981). Although Judge Pratt did not give counsel a verbatim version of his proposed response, he held an extended colloquy with counsel, afforded both sides an opportunity to suggest their preferred responses, then outlined, in summary fashion, the response he proposed to give, and thereafter allowed counsel to make further argument. There is no basis for procedural complaint, especially in view of the fact that counsel's remarks, after hearing what Judge Pratt proposed to do, questioned only the substance of the response and offered no suggestion that might improve its wording.

24 Murphy was acquitted on the bribery count and therefore challenges the supplemental instruction only as it may have affected the element of receipt for the unlawful gratuity and conflict of interest counts, the substantive counts on which he was convicted. Since we conclude that the supplemental instruction did not alter the prosecution's obligation to prove that Murphy must be shown to have received the money for his benefit, we are willing to assume, for the sake of argument, that, though the jury's inquiry mentioned only Count Two, they understood the response also to apply to the receipt element of the counts charging an unlawful gratuity and a conflict of interest. In his initial charge, Judge Pratt had told the jury that the element of receipt as to bribery applied equally to the other substantive offenses. Section 201(g), punishing receipt of an unlawful gratuity, is limited to receipt by the public official "for himself," and "for any other person or entity" as provided in section 201(c), punishing bribery. We are also willing to assume, for the sake of argument, that section 203(a), punishing conflict of interest, is limited to receipt of compensation by and for the public official, though this point is somewhat doubtful. *Cf. United States v. Shirey*, 359 U.S. 255 (1959) (construing 18 U.S.C. § 214 (1958) (now 18 U.S.C. § 210 (1976)).

20 and had permitted Criden to take physical possession, presumably with the expectation that at some point Murphy would regain physical possession of a portion of the money, even if the occurrence of that last step was not found to have been established.[25] The jury wanted to know if receipt could be found to have occurred on October 20, and Judge Pratt correctly told them that it could. Since the principally disputed issue as to Murphy was whether he knew there was any money in the briefcase on October 20, it is difficult to see how the defense would have acted differently if it had been specifically alerted to a theory of receipt on October 20, a theory that, in any event, was comprehended by the bill of particulars. In arguing the point on appeal, Murphy makes no showing of any prejudice from the supplemental instruction. Thompson likewise offers no theory of prejudice as to him. The jury's question and the Court's response both related explicitly to Murphy, leaving unvaried in any respect the initial instruction that the jury must find Thompson to have received his share of the October 20 payment sometime after the meeting.

Murphy contends that the instruction permitted the jury to find receipt on a theory of constructive possession without adequate guidance as to the standards governing that concept. That complaint cannot be made now. Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the

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25 Early in the colloquy with counsel, Judge Pratt had suggested that it would be "kind of a far-out view" if the jury thought that on October 20, Murphy "really didn't accept [the money] for his own benefit" and was "giving it up to Howard Criden with no further claims on it." On appeal counsel dwell on this characterization, overlooking the fact that the supplemental instruction that Judge Pratt decided to give did not permit the jury to abandon the requirement that Murphy must receive the money for his own benefit.

delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given. This is not the first time that a jury's question has insightfully gone to the heart of a matter. Judge Pratt's handling of the episode was admirable under the circumstances.

2(b). *Jury Instructions—the Section 203(a) Offense.* Murphy challenges the jury instruction concerning the elements of Count Three, the so-called conflict of interest offense, 18 U.S.C. § 203(a). His principal point is that section 203(a) proscribes receipt of payment for rendering only "representational" services before government agencies, whereas the District Court's instruction permitted the jury to find a violation for rendering services of a broader nature including merely giving advice.[26] The claim requires consideration of the structure of the text of section 203(a), which reads as follows:

> Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

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26 Murphy also contends that the charge was deficient in not specifying as an element of the offense that the proceeding in relation to which services are rendered be *pending* before a governmental forum. However, the statute contains no requirement of a proceeding pending at the time compensation is received. *United States v. Evans*, 572 F.2d 455, 481 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Johnson*, 337 F.2d 180, 196 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966).

> (1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or
>
> (2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia,
>
> in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, [shall be punished].

From the standpoint of grammar, the issue is whether the phrase "before any department, agency, court-martial, officer, or any civil, military, or naval commission" modifies the category of covered proceedings or the category of covered services. The placement of the "before" phrase adjacent to the category of covered proceedings is some indication that only the immediately preceding category was intended to be modified. But this structural point is not so compelling as to preclude examination of legislative history. The Report of the Senate Committee on the Judiciary describes the predecessor statute, 18 U.S.C. § 281 (1958), as prohibiting Members of Congress and officers and employees of the Government "from receiving compensation for services rendered

for others before a Federal department or agency in matters in which the Government is a party or is interested." S. Rep. 2213, 87 Cong., 2d Sess. 9, *reprinted in* 1962 U.S. Code Cong. & Ad. News 3852, 3858. In section 281 the "before" phrase had appeared in the same position as it does in section 203(a), yet the drafters of the Senate Report apparently thought the phrase modified the services rendered. The Report points out that section 203(a) continues the restraint of the prior section "in full effect" with one exception not here pertinent. *Id.* The Report of the House Committee on the Judiciary contains two references to our problem; unhappily each points in a different direction. The summary of provisions, like the Senate Report, describes the predecessor statute, section 281, as prohibiting receipt of compensation "for services rendered before Federal agencies" in matters in which the United States has an interest. H. Rep. No. 748, 87th Cong., 1st Sess. 9 (1961). However, the section-by-section analysis describes former section 281 as prohibiting receipt of compensation "for services in relation to any matter in which the United States is interested and which is before any Government agency." *Id.* at 19. Our uncertainty remains.

Fortunately, section 203(a)'s statutory genealogy provides significant clues to its meaning. In 1864, Civil War scandals involving corrupt use of influence prompted Congress to pass section 203(a)'s earliest predecessor, a statute barring Members of Congress and federal employees from receiving compensation for rendering services in governmental proceedings before federal departments, agencies, and military commissions. Act of June 11, 1864, ch. 119, 13 Stat. 123.[27] Although the language of

[27] *See Ass'n of the Bar of the City of New York, Conflict of Interest and Federal Service* 40 (1960).

(Footnote continued)

this early statute shares the grammatical ambiguity of current section 203(a), the legislative debate that surrounded its passage reveals that Congress was primarily concerned with government officials' being paid to bring their influence to bear on federal agencies. According to Senator Trumbull, Chairman of the Senate Judiciary Committee, the statute was designed "to prevent Representatives and Senators in Congress and officers of the government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus of Government." Cong. Globe, 38th Cong., 1st Sess. 561 (1864).

In interpreting the more recent predecessors of section 203(a), modern courts and commentators have agreed that an essential element of the offense is some appearance before, or at least contact with, a federal department by the accused official. In *United States v. Adams*, 115 F. Supp. 731, 735 (D.N.D. 1953), *appeal dismissed*, 209 F.2d 954 (8th Cir. 1954), a District Court dismissed an indictment based on 18 U.S.C. § 281 (1952), section 203(a)'s

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The original statute read as follows:

> [N]o member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a department, head of a bureau, clerk, or any other officer of the government receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.

The statute was recodified in essentially the same form in R.S. § 1782 (1873). Later, it was modestly revised and amended by Act of Mar. 4, 1909, ch. 321, § 113, 35 Stat. 1088, 1109. Afterwards, it was recodified at 18 U.S.C. § 203 (1926) where it remained until the 1948 revision of the federal criminal laws placed it, along with some minor amendments, at 18 U.S.C. § 281 (1952).

most recent predecessor, because the indictment failed to allege that the defendant's services were to be rendered before a federal department. *Accord United States v. Waldin*, 122 F. Supp. 903, 904 (E.D. Pa. 1954).[28] A review of the legislative history and cases has led a knowledgeable commentator in this area to conclude that under section 203(a), and all its predecessors, "criminal penalty attaches to a government employee's compensated services if, and only if, the services are performed in particular designated forums." B. Manning, *Federal Conflict of Interest Law* 55 (1964). This background suggests that section 203(a) should be limited to services rendered before federal agencies—the mischief toward which the statute was directed—and not mere advice concerning agency proceedings.

A further consideration favoring this construction is the hazards created by a broader interpretation. Since a Member of Congress is entitled to appear before courts, even on matters in which the United States has an

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[28] In most of the cases interpreting section 203(a), the defendants had actually rendered services before a federal agency. *See, e.g., Burton v. United States*, 202 U.S. 344 (1906); *May v. United States*, 175 F.2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949); *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). It is of interest, though not decisive, that some of these decisions describe the statute as prohibiting the rendering of services before a federal department. In *Burton*, the Supreme Court, upholding the constitutionality of R.S. § 1782 (1873), a predecessor of section 203(a), referred to the authority of Congress to make it an offense for a Senator to receive compensation "for services to be rendered or rendered to any person, before a department of the government, in relation to a proceeding" in which the United States has an interest. 202 U.S. at 365; *see also United States v. Johnson*, 215 F. Supp. 300, 316 (D. Md. 1963) ("The words 'before any department, agency,' etc. refer to where the services have been rendered or are to be rendered, not where the proceeding or other matter is pending."), *aff'd on other grounds*, 337 F.2d 180, 196 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966); *United States v. Booth*, 148 F. 112, 119 (C.C.D. Or. 1906) ("the service must be performed, 'before any department [etc.]' ").

interest, *see, e.g., United States v. Waldin, supra; United States v. Quinn,* 111 F. Supp. 870 (E.D.N.Y. 1953), he may encounter a situation where a matter concerning his client merits court challenge but requires prior exhaustion of administrative remedies. Unquestionably the Member would be barred by section 203(a) from handling the matter before the administrative agency, and some courts apparently believe that section 203(a) prevents a government official from plea-bargaining with the Justice Department when the official is representing a criminal defendant. *See Chudoff v. McGranery,* 179 F.2d 869 (3d Cir. 1950). *But see United States v. Johnson,* 215 F. Supp. 300, 315 (D. Md. 1963), *aff'd on other grounds,* 337 F.2d 180 (4th Cir. 1964), *aff'd,* 383 U.S. 169 (1966). But, under the Government's view in the instant appeal, a federal official would also violate section 203(a) if the official, in the course of counseling his client, advised him to obtain additional counsel for representation before a federal department or agency. It seems unlikely that Congress, having framed section 203(a) to allow Members of Congress to represent clients in court, intended the statute to reach so far as to raise the prospect of a criminal violation when the lawyer-legislator counsels his client.

The Government suggests that a broad reading of section 203(a) is supported by a comparison of its terms with those of 18 U.S.C. § 205, set out in the margin,[29]

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[29] Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(Footnote continued)

which explicitly covers representational activities. Section 205 applies only to officers or employees of the United States and not to Members of Congress. It covers the identical category of proceedings described in section 203(a). Its list of forums is similar to that in section

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(2) acts as agent or attorney for anyone before any department, agency, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 205 (1976). Section 205(1)'s earliest statutory forebear was enacted in 1853. It read:

[A]ny officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, who, after the passage of this act, shall act as an agent or attorney for prosecuting any claim against the United States, or shall in any manner, or by any means, otherwise than in the discharge of his proper official duties, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be liable to indictment, as for a misdemeanor, in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.

Act of Feb. 26, 1853, ch. 81, § 2, 10 Stat. 170. This statute was recodified in essentially the same form in R.S. § 5498 (1873). Later, it was amended by Act of Mar. 1, 1901, ch. 670, § 1, 31 Stat. 844, and Act of Mar. 4, 1909, ch. 321, § 108, 35 Stat. 1088, 1107-08. Afterwards, it was recodified at 18 U.S.C. § 198 (1926), recodified again at 18 U.S.C. §§ 198, 198a (1934), and amended once more by the 1948 revision of the federal criminal laws. Finally, it was codified at 18 U.S.C. § 283 (1952).

This statute was most recently revised in 1962. Act of Oct. 23, 1962, Pub. L. 87-849, § 1(a), 76 Stat. 1122. The verbosity of previous versions was eliminated, and section 205(2) was added.

203(a) with the notable addition of "courts."[30] But section 205 differs markedly from section 203(a) in two respects. First, section 205 prohibits conduct whether or not performed for compensation, whereas section 203(a) prohibits only conduct rendered for compensation. Second, and central to the Government's argument, section 205 prohibits an official from acting "as agent or attorney for anyone," whereas section 203(a) prohibits rendering "any services." From this latter difference the Government argues that Congress intended section 203(a) to proscribe a wider range of services than the representational services proscribed by section 205. The argument has some force, but is not decisive. Even as to officers or employees of the United States, who are covered by both statutes, the conduct proscribed by section 203(a) could be limited to services rendered before federal agencies, without completely duplicating the prohibition of section 205. Section 203(a) would then cover any contact made with an agency, whether or not the official was acting as agent or attorney, as specified in section 205.

The legislative history of section 205 undermines the Government's claim of a clear-cut distinction between sections 205 and 203(a). A House Report accompanying the 1962 revision of the federal conflict of interest laws states that the purpose of section 205 is to prevent federal employees "from using actual or supposed influence in support of private causes." H.R. Rep. No. 748, 87th Cong., 1st Sess. 21 (1961). The Report recognized that "section 281 [now section 203(a)] prohibits conduct *of this nature* when compensated," but added that "it is

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30 The combined effect of omitting Members of Congress from section 205 and omitting courts from the forums listed in section 203(a), which applies to Members of Congress, permits Members of Congress to appear before courts.

important that this type of representative activity be prohibited when it is not compensated." *Id.* (emphasis added). This suggests, contrary to the Government's contention, that the conduct prohibited by sections 203(a) and 205, both of which apply to federal employees, is similar. Both involve using actual or supposed influence, with section 205, but not section 203(a), requiring a formal representational role. As pointed out in a Justice Department memorandum of which Congress has taken note, "[W]hile section 203 is controlling as to Members of Congress, for all practical purposes section 205 completely overshadows section 203 in respect of officers and employees of the Government."[31] Memorandum of Attorney General—Standards of Ethical Conduct for Government Officers and Employees, Exec. Order No. 11,222 (1965), *reprinted in* 18 U.S.C. § 201 note, at 1025-32 (1976). If section 205 in fact largely duplicates section

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31 Significantly, this memorandum describes section 203(a) as prohibiting Members of Congress and government employees from receiving compensation "for services rendered on behalf of another person before a Government department." 18 U.S.C. § 201 note, at 1028.

The parties call our attention to other views previously expressed by the Department of Justice, of which Congress has taken note. Murphy cites a Senate Judiciary Report that includes the following: "The Department of Justice has, however, followed the more restrictive interpretation that the services rendered for compensation by the public servant must be representational in nature and not merely in the form of advice or assistance in writing contracts and the like." *Criminal Code Reform Act of 1977: Report of the Senate Judiciary Comm.*, S. Rep. No. 95-605, 95th Cong., 1st Sess. pt. 1, at 403 (1977). The Government cites the following statement, submitted by the Department of Justice to a House Judiciary Subcommittee: "[A]ny utilization of official position to serve a private client, whether to influence the action of others or not, seems within the ban of the statute." Memorandum of the Office of Legal Counsel for the Attorney General (Dec. 10, 1956), *reprinted in Federal Conflict of Interest Legislation: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., ser. 17, pt. 2, at 645-46 (1960).

203(a), as applied to federal employees, the Government cannot now argue that the two sections have two entirely distinct purposes.

The Government finally contends that section 203(a) should be broadly read to make sure that Members of Congress do not receive any extra compensation for rendering advice on governmental matters, advice that falls within their obligations to their constituents and the public generally. If Congress were to legislate that broadly, it would have to clarify the line between permissible legal practice and illegal advice on governmental matters.[32] Under all the circumstances, though we cannot be certain what Congress had in mind in the original enactment in 1864 or the revision in 1962, we think it sounder to construe section 203(a) to reach only services performed or to be performed before the federal forums listed in the statute.

This interpretation, however, is not quite as limited as the "representational" role urged by Murphy. It includes, in the words of the statute, "any services . . . in relation to" the proceedings listed in the statute so long as the services are compensated and are rendered "before" the listed forums, whether or not the Member of Congress formally appears as attorney or agent. And, of course, informal contacts, as well as formal appearances, are proscribed.

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[32] To a considerable extent, the Government's concern that Members of Congress should not be permitted to accept extra compensation for performing their duties is met by the provisions of the unlawful gratuity statute, 18 U.S.C. § 201(g) (1976), which formed the basis for Murphy's conviction on Count Five. Though that statute is broad in scope, it is limited to receipt of payment because of "any official act" performed or to be performed, and does not extend to the giving of advice, which the Government would include under § 203(a).

In the *Thompson-Murphy* trial, Judge Pratt, over the objection of Murphy,[33] gave the jury a broad definition of the "services" element of a violation of section 203(a). Rather than limit the term "services" to those to be performed "before" a federal agency, as we construe the statute to require, he told the jury that the term could include "a wide variety of services such as giving advice about [i]mmigration, how to delay deportation, how to improve one's chances of remaining in the country . . . ." The summation on behalf of Murphy had argued, based on some of the phrases he used at the October 20 meeting, that he was only advising the sheik's representatives to consult with Criden, who would handle legal matters concerning immigration problems. Since the charge erroneously permitted the jury to convict on Count Three by considering this type of advice to be covered by section 203(a), the conviction on that count must be reversed. However, since the evidence was suffi-

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33 The Government contends that Murphy waived objection to the charge by not objecting after its delivery to the jury, as required by Fed. R. Crim. P. 30. However, Murphy submitted a proposed instruction on section 203(a), which limited the prohibited services to "interceding" with federal agencies and made clear that advising a person to seek the advice of attorneys is not improper. "Interceding" may connote in some minds a more direct action than the rendering of "any" services "before" a federal forum "in relation to" a proceeding in which the United States has an interest. Nevertheless, the proposed instruction, if not precisely correct, sufficiently alerted the District Court to Murphy's well-taken point that giving advice is outside the reach of the statute. Normally, the submission of a requested instruction is not sufficient to preserve for appeal complaint that the charge as given failed to include it, *see United States v. Fountain*, 642 F.2d 1083, 1095 (7th Cir.), *cert. denied*, 642 U.S. 1083 (1981), but in this case, Judge Pratt informed counsel, after considering and ruling upon requested instructions at a charge conference, that their objections voiced at that time would suffice to preserve issues for appeal, in lieu of renewing claims for such instructions after the jury charge. In that circumstance, the pre-charge objection to the denial of the requested instruction satisfied Rule 30.

cient to permit a finding that Murphy had in fact accepted money for services to be rendered before federal agencies or departments on immigration matters, the Government is entitled to prosecute the section 203(a) charge anew, if it is so advised.

3. *Sufficiency of Evidence.* Thompson challenges the sufficiency of the evidence against him, contending that the evidence failed to show that he received a portion of the $50,000 transferred at the October 20 meeting with Murphy and Criden and failed to show that he agreed to take any official action. However, Cook testified that Criden told him about delivering Thompson's share to the Congressman at a coffee shop shortly after October 20. Thompson's meeting with Criden at the time and place Criden had mentioned to Cook was corroborated by eyewitness testimony. The jury was entitled to infer from the October 9 transaction with Thompson and Criden that Criden's report to Cook was credible. Thompson's agreement to take official action on immigration matters is fully established by his statements made at the morning meeting on October 9, the meaning of which is amplified by his statement to Congressman Murtha that "all we have to do is help these two Arabs get into the country perhaps sometime in the future."

Murphy's challenge to the sufficiency of the evidence claims that the prosecution did not prove his receipt of money for his benefit. The Government maintains that the evidence showed receipt by Murphy both at the October 20 meeting when the briefcase containing $50,000 was handed to Criden and at some point thereafter when Murphy obtained physical possession of his share of the $50,000. We confine our attention to the October 20 meeting, which is apparently what the jury did, judging from their inquiry concerning constructive

possession. In the context of the events that preceded that meeting, the episode could fairly be viewed by the jury as satisfying the receipt element of both of the substantive counts on which Murphy was convicted, unlawful gratuity and conflict of interest.[34] Criden and Thompson had developed an arrangement whereby money would be transferred by the sheik's representative without the necessity for Thompson physically to handle the briefcase in the presence of Amoroso and Weinberg. Using guarded conversation, Thompson and Criden would say only enough to satisfy the sheik's representatives that Thompson was acknowledging receipt of money. The arrangement, carried out on the evening of October 9, ended with Amoroso indicating the briefcase and Thompson saying to Criden, "You look after that for me will you?" Thompson then recruited Murphy, and the jury was entitled to infer, from the sequence of events and what they saw on videotape, that at the October 20 meeting Criden and Murphy were following the same arrangement previously employed by Criden and Thompson. There was just enough conversation about money to reassure the sheik's representatives that Murphy was acknowledging his awareness of a payment. Amoroso then moved the briefcase toward the couch where Murphy and Criden were seated, Criden said, "Why don't you give that to Jack?", and Murphy replied, "Howard why don't you take care of that."

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[34] As previously indicated, *supra* note 24, we are willing to assume, for the sake of argument, that both section 201(g) and section 203(a) require not only receipt of money but also receipt for the benefit of the defendant. In his initial instruction to the jury, Judge Pratt had explained that the "receipt" element of the bribery offense, section 201(c), required receipt for the benefit of the defendant and then stated, "This is a common element, either directly or indirectly, . . . in all of the substantive counts."

This evidence entitled the jury to find that Murphy had at that point received the money. Having struck an agreement to accept money in return for assistance with the immigration matter,[35] Murphy was in constructive possession of the money in the briefcase when he exercised the authority to direct that Criden should take physical possession of it. An illegal payment is sufficiently received when the person who has agreed to receive it directs that it be held by his "bag man."[36] The evidence also permitted the jury to find that Murphy received the money for his own benefit. The contrary inference, that he was agreeing to use his congressional influence in order to confer a benefit solely upon Criden, is utterly implausible.

4. *Evidentiary Rulings.* Thompson contends that the videotaping of his conversations with the undercover agents violated rights protected by the Fourth Amendment and, because he was a Congressman, also violated the First Amendment and the doctrine of separation of powers. The claim was not asserted at trial by a timely motion to suppress, *see United States v. Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975), and, in any event, is without merit. Thompson's conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were

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35 Though the jury was apparently not sufficiently persuaded that Murphy had agreed to take official action to convict him of bribery, they were entitled to use his statements indicating agreement as evidence of the context in which the handling of the briefcase was to be assessed for purposes of determining receipt.

36 The Government correctly points out that simply an agreement to receive money, rather than actual receipt, would violate section 201(g) and section 203. However, Judge Pratt instructed the jury that receipt was required.

proper evidence. *See United States v. White*, 401 U.S. 745, 749-53 (1971); *Lopez v. United States*, 373 U.S. 427, 437-40 (1963); 18 U.S.C. § 2511(2)(c). Since the tapes contained material evidence of criminal violations, they were not immunized by the circumstance that Thompson was a Congressman at the time the conversations occurred. *Cf. United States v. Nixon*, 418 U.S. 683 (1974).

Thompson claims that the Speech or Debate Clause bars the introduction into evidence of his private conversations with Congressman Murtha on the floor of the House of Representatives, in which he invited Murtha to join the ranks of those accepting bribes. One would think that a Congressman, even when grasping for objections to a criminal conviction, would understand that the Speech or Debate Clause accords immunity to what is said on the House floor in the course of the legislative process, *Gravel v. United States, supra*, not to whispered solicitations to commit a crime.

Conclusion

In considering the myriad issues raised by these seven appellants, we are not passing judgment on the wisdom of the Abscam investigation, nor on whether the means by which it was conducted conformed to internal administrative standards of the Department of Justice or to other standards that the Executive Branch might choose to adopt or the Legislative Branch might require. Our task is to determine whether the methods employed and the conduct of the ensuing trials render the resulting convictions invalid under the Constitution and laws of the United States or whether they present one of those rare occasions when we are authorized to vacate convictions in

the exercise of a limited supervisory power over the administration of federal criminal justice.

The four Congressmen were caught on videotape in the very act of committing federal crimes. There was sufficient evidence of their guilt and that of the other defendants. The conduct of the investigation, though subject to some criticism, affords no basis for rejecting the convictions. The pretrial proceedings conducted by Judge Mishler and the trial and post-trial hearings conducted by Judge Pratt were vigorous contests marked throughout by the fairness, patience, and thoroughness of the District Judges. We have carefully considered all of the appellants' claims, including those not discussed in this opinion, and, with the exception of the attack upon the charge as to section 203(a) in the *Thompson-Murphy* trial, we find them all to be without merit, both for the reasons we have set forth and for the further reasons detailed in Judge Pratt's comprehensive opinion denying post-trial motions in the District Court. 527 F. Supp. 1206. We reverse only the conviction of John Murphy on Count Three of the indictment in No. 81-1346,[37] which we remand for a new trial, and in all other respects all the judgments appealed from are affirmed.

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[37] The practical consequence is to reduce Murphy's aggregate fine from $20,000 to $10,000.

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MEMORANDUM AND ORDER DENYING DUE PROCESS AND OTHER POST-TRIAL MOTIONS OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED JULY 24, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA DOCKET NO. CR 80-00249

-against-

MICHAEL O. MYERS
ANGELO J. ERRICHETTI
LOUIS C. JOHANSON and
HOWARD L. CRIDEN,

Defendants.

----------x

UNITED STATES OF AMERICA DOCKET NO. CR. 80-00253

-against-

RAYMOND F. LEDERER
ANGELO J. ERRICHETTI
LOUIS C. JOHANSON and
HOWARD L. CRIDEN,

Defendants.

----------x

UNITED STATES OF AMERICA DOCKET NO. CR 80-00291

-against-

FRANK THOMPSON, JR.
JOHN M. MURPHY
HOWARD L. CRIDEN and
JOSEPH SILVESTRI,

Defendants.

- - - - - - - - - - - - - - - - - - x

MEMORANDUM AND ORDER DENYING "DUE PROCESS" AND OTHER POST-TRIAL MOTIONS

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PRATT, J:

I. ABSCAM

"Abscam" is the code word given by the Federal Bureau of Investigation to an undercover "sting" operation conducted out of the FBI OFFICE AT Hauppauge, Long Island, New York, under the supervision of agent John Good. Abscam began after Melvin Weinberg in 1977 was convicted in the Western District of Pennsylvania on his plea of guilty to fraud. In return for a sentence of probation Weinberg agreed to cooperate with the FBI in setting up an undercover operation similar to the London Investors, Ltd. "business" that Weinberg had used with remarkable success before his arrest and conviction in Pittsburgh.

For most of his life Weinberg had been a "con man" operating in the gray area between enterprise and crude criminality. For a number of years in the 1960s and early 1970s, he had been listed as an informant by the

FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his ,7. guilty plea and agreement to cooperate with the FBI.

As agent-in-charge of the FBI's Long Island office Good as, at all times, the supervising agent for Abscam. Initially, Weinberg worked directly under special agent John McCarthy who later was replaced by special agent Anthony Amoroso. Both McCarthy and Amoroso worked undercover with Weinberg.

The general pattern of the "scam" or "sting" operation reflected Weinberg's earlier theme of representing wealthy Arab interests who had large sums of cash available for business opportunities in this country. When operating outside the law in Huntington, Long Island as London Investors, Weinberg's method had been a "front-end scam"

for real estate investment wherein he would promise to obtain large loans for his victims and pick-up "appraisal" or "processing" fees of several thousand dollars, but without ever producing the final loans.

Although not identical to London Investors, the initial plan developed by Weinberg and the FBI was similar. Weinberg was to present himself as a business agent for "Abdul Enterprises," an organization backed by two extremely wealthy Arab sheiks looking for American outlets for their cash. He would pass the word of his big money available for deals to other con men and people who move between the legitimate and illegitimate. If criminal proposals appeared, (8) appropriate action would be taken by the FBI.

Weinberg and the agents set up business in an office in Holbrook, Long Island. The FBI's code name "Abscam" came from the first two letters of "Abdul," combined with the word "scam".

At first Abscam's focus was upon stolen and forged securities and stolen art work. Other "investment" oppor-

tunities soon presented themselves, and quickly the investigation turned itself toward Atlantic City and the gambling casinos which were then being proposed and constructed. As word spread about Weinberg's contact with virtually inexhaustible Arab funds, Angelo Errichetti, who was both mayor of Camden, New Jersey, and a New Jersey state senator, came on the scene. Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit securities, as well as intimate knowledge of which members of the New Jersey legislature could be brought.

Errichetti brought to the undercover agents Howard Criden, a Philadelphia lawyer seeking to promote a gambling casino in Atlantic City. In July of 1979, Errichetti and Criden met with Weinberg and Amoroso on the sheiks' yacht in Florida to discuss financing for the proposed casino (9) that a client of Criden's wanted to build. In the course of the day Amoros and Errichetti discussed the

problem that might be faced by the sheiks should a revolution occur in their country and should they want to come to the United States as permanent residents. Amoroso told Errichetti that he thought cooperation of public officials would be needed and that money would be no problem.

Immediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf. Meetings were arranged at various locations in New York, Philadelphia and Washington where the FBI monitored the proceedings with concealed videotape cameras and microphones. Where videotape was not feasible, audio recordings were used.

Cash payoffs were made by the undercover agents to six members of the House of Representatives, one immigration official, Mayor Errichetti, two members of the Philadelphia city council, and allegedly, to a member of

the New Jersey Casino control Commission. In addition to the transactions involving cash payments to public officials, Abscam was stringing along in separate discussions a number of persons, including Senator Harrison A. Williams, Jr. and Congressman John M. Murphy, in connection with promised (10) investments on projects in which each was to hold an interest.

Toward the end of 1979 the credibility of Abdul Enterprises was beginning to wear thin, because the only cash produced were the $50,000 payments to congressmen, relatively small amounts when compared to the large business investments and bank deposits which had been promised by Weinberg and Amoroso. Security for the investigation was increasingly jeopardized as more and more people became aware of Abdul Enterprises and its activities, and the end of the investigation was clearly in sight by December, 1979. Because much of the revealed political corruption focused on the Philadelphia area, at the request of the U.S. Attorney for the Eastern District of Pennsylvania the investigation was extended for a brief

period in order to provide an opportunity for uncovering there additional corruption at the local level.

Saturday, February 2, 1980, was scheduled as the wrap-up day of the investigation, the day on which Abscam was to "go public". A few days before that, some reporters got wind of the investigation and sought information about it, particularly from the U.S. Attorney in Philadelphia and from Thomas Puccio and his staff at the Eastern District Strike Force in Brooklyn. The government representatives managed to keep the publicity lid on until (11) Saturday, February 2, 1980, when teams of FBI agents interviewed, almost simultaneously, many of those whose activities with Weinberg and Amoroso had marked them as either targets or key witnesses in the Abscam investigation.

Abscam's surfacing brought extensive publicity, enhanced, perhaps, by almost simultaneous surfacing of other FBI "sting" operations, "Brilab" and "Pendorf" in the south and west parts of the country, respectively.

As a result of the Abscam investigation, grand juries returned the following indictments:

1. US v. Alexander Andrew Alexandro, Jr. and Alfred Carpenetier, docket no. CR 80-00102, Eastern District of New York, tried before Hon. Mark A. Costantino in October, 1980.

2. US v. Michael O. Myers, Angelo J. Errichetti, Louis c. Johanson and Howard L. Criden, docket no., CR 800253, Eastern District of New York, tried before the undersigned in January, 1981.[1]

3. US v. Raymond F. Lederer, Angelo J. Errichetti, Louis C. Johanson and Howard L. Criden, docket no. CR 80-00249, Eastern District of New York, tried before the undersigned in August, 1980.

(12)

4. US v. Frank Thompson, Jr., John M. Murphy, Howard L. Criden and Joseph Silvestri, docket no. CR 80-00291, Eastern District of New York, tried before the undersigned in November, 1980[2]

5. US v. Harry P. Jannotti, George X. Schwartz, Howard L. Criden and Louis C. Johanson, docket no. CR 80-00166, Eastern District of Pennsylvania, tried before Hon. John P. Fullam in September, 1980.[3]

6. US v. John W. Jenrette and John R. Stow, docket no. CR 80-00289, District of Columbia, tried before Hon. John G. Penn in September, 1980.

7. US v. Richard Kelly, Eugene Robert Ciuzio and Stanley Weisz, docket no. CR 80-00340, District of Columbia, tried before Hon. William B. Bryant in December, 1980.

8. US v. Harrison A. Williams, Jr., Alexander Feinberg, George Katz and Angelo J. Errichetti, docket no. CR 80-00575, Eastern District of New York, tried before the undersigned in April, 1981.[4]

9. US v. Kenneth N. MacDonald and Angelo Errichetti, docket no. CR 81-00366. Indictment returned June 18,

1981, Eastern District of new York, to be tried before the undersigned in November, 1981.

(13)

10. US v. Charles T. Walsh, Marting Gabey, Vincent J. Cuti, Jr., Nicholas Barbato, Angelo J. Errichetti, and Bowe, Walsh & Associates, docket no. CR 81-00218. Indictment returned April 9, 1981; superseding indictment returned May 21, 1981, Eastern District of New York, to be tried before the undersigned in September, 1981.[5]

The court is informed that the Abscam grand jury is still sitting in the Eastern District of New York, and that still more indictments are anticipated.

In all cases tried to date, the principal evidence against most of the defendants consisted of the videotapes of their own words and actions. That evidence was supplemented by audiotapes of meetings and telephone conversations, testimony by co-conspirators and unrelated third party witnesses, and documents. There was also testimony by FBI agents of interviews with various defen-

dants. In addition, Amoroso and Weinberg testified, but primarily to set the scene and provide a framework for introduction in evidence of the video and audio tapes. Some defendants were severed for trial; all who were tried, were found guilty by the jury on one or more counts.
(14)

II. THE SUBJECT CASES

Before considering and deciding the parties' claims on the instant motions, the court will review in more detail the circumstances of each of the three cases in which post-trial motions are now pending.

A. US v. Myers, Errichetti, Johanson and Criden.

The Myers trial involved four defendants. Defendant Michael O. Myers was a member of the United States House of Representatives from Philadelphia. He was brought to the undercover operatives through defendants Angelo J. Errichetti and defendant Howard L. Criden, who made contact with Myers through Criden's law partner, defendant Louis C.Johanson.

Myers was the first congressman to take money in front of the Abscam TV cameras. He did so in a hotel room at Kennedy Airport on August 22, 1979 in the presence of Errichetti, Amoroso and Weinberg; Johanson and Criden had both travelled to Kennedy Airport for the occassion, but were not present when the money was given by Amoroso to Myers. All four defendants shared in the $50,000, with Errichetti receiving $15,000, Myers $15,000 and Johanson and Criden $20,000, part of which they shared with their ,15. law partner, Ellis Cook, who testified at the trial as an immunized witness.

The specific charges against the defendants were bribery (18 USC Sec. 201 (c)), criminal gratuity (18 USC Sec. 201 (g)), interstate travel for unlawful activity (18 USC Sec. 1952), and conspiracy (18 USC Sec. 371). Myers was charged with direct violations of the first three offenses; the other defendants were charged with aiding and abetting Myers' commission of the offenses. 18 USC Sec. 2.

Myers testified on his own behalf and attempted to convince the jury that when he appeared on the videotape and received the money in return for his promise to introduce a private bill to enable the sheik to enter and remain in this country, he was only "play acting". He argued that he had no criminal intent under the federal statutes because he never intended ultimately to do the acts for which he was receiving the money. In other words, Myers' defense was essentially that although he was swindling the sheik, in no way was he compromising his congressional office. Resolution of that central fact question rested peculiarly within the jury's province. They had the opportunity to view Myers on the witness stand and to evaluate his conduct and statements before the TV cameras. In fact, the jury asked to review the key videotapes during their (16) deliberations. Ultimately they resolved this credibility issue against Myers.

Under the court's instructions, the jury's verdicts of guilty against all defendants necessarily established the elements of the crimes charged.

On the bribery count, 18 USC Sec. 201 (c), the jury found that Myers received money from Amoroso in return for being influenced in his performance of an offical act, and that he acted knowingly, wilfully, and corruptly. the central issue presented to the jury was Myers' intent when he took the money. The jury's verdict determined that he took it with a specific intent to be influenced in connection with offical matters relating to immigration, and that the other defendants aided and abetted him in his bribery.

Under the court's instructions the jury returned no verdict on the criminal gratuity count, 18 USC Sec. 201 (g0, a lesser included offense of the bribery count (Sec 201(c)), because they had found all defendants guilty of bribery.

On the interstate travel count, 18 USC Sec 1952, the jury found that on August 22, 1979 Myers travelled in the interstate commerce from Philadelphia to JKF airport in New York with the intent to carry on the unlawful activity of receiving a bribe, that he thereafter performed an act (17) either to carry on or promote the unlawful activity or

to distribute its proceeds, and that he acted knowingly and wilfully. Again Errichetti, Criden and Johansen were found guilty as aiders and abetters.

On the conspiracy count, 18 USC Sec 371, the jury found that all four defendants conspired to defraud the United States of the faithful and honest service of Congressman Myers and to have him receive money as a bribe in connection with the immigration, residency and citizenship problems of the fictitious middle eastern businessmen.

Once the jury resolved the central credibility issue as to whether Myers was "play acting" before the cameras with no intent to have it affect his official conduct, the evidence against the defendants was overwhelming, and there is no basis to set aside any of the verdicts for insuffiency of evidence.

B. US v. Lederer

Trial of the Lederer events seemed like a rerun of the Myers story. Only the congressman was different. Raymond F. Lederer was also a member of the House of Representatives from Philadelphia. He was also brought to the undercover agents through the activities of Criden, Johanson and Errichetti. He, too, was given $50,000 in front of the TV cameras at a Kennedy Airport hotel in return for (18) his promise to use his office and influence to assist the sheik in his immigration efforts. Lederer received only $5,000 of the total sum, however; the remainder was divided among Criden, Johanson and Errichetti.

The charges against the Lederer defendants were bribery (Sec. 201 (c)), criminal gratuity (Sec 201 (g), interstate travel for unlawful activity (Sec. 1952), and conspiracy (Sec. 371).

Lederer was tried alone. See note 1, supra. He testified on his own behalf and presented a defense of

entrapment which the jury resolved against him. The court instructed the jury that there was ample evidence of inducement and that the key entrapment issue for them to focus upon was whether or not Congressman Lederer was predisposed to commit the crimes charged. The jury's verdicts resolved that issue against Lederer on each count. Those verdicts also establish all the necessary elements of each of the charges beyond a reasonable doubt. Once again, the videotape evidence showing Lederer accepting the money in return for his assurances of action on the sheik's behalf in immigration matters was overwhelming.

C. US v. Thompson & Murphy

Frank Thompson, Jr. and John M. Murphy, United States congressmen from Trenton, New Jersey and Staten Island, New York, respectively, were the third and fourth (19) members of the House of Representatives to be indicted in the Eastern District of New York. The facts and charges against them were more complex and subtle than those

against Myers and Lederer. Ther codefendants, Criden and Joseph Silvestri, were severed. See note 2, supra.

Although Thompson had received a $50,000 payment from the undercover agents in Washington in connection with his own promise to provide immigration assistance to the sheik, the charges against him under this indictment grew out of a payment made to Congressman Murphy in a hotel near Kennedy Airport. The government's evidence showed that Thompson had approached two other congressmen, John P. Murtha and defendant Murphy, encouraging them to meet with the sheik's representatives in return for "walking around money" that would be shared with Thompson. The Thompson-Murphy trial was complicated by an involved transaction wherein Murphy and a business partner sought from the sheik financing for the acquisition of a shipping company in Puerto Rico.

Murtha refused to accept the money, and no indictment was returned against him. The jury found that Murphy did accept the money offered to him, and while the

jury found Murphy not guilty of bribery, apparently because they were not satisfied that he had fully committed himself to use his influence on the sheik's behalf, they did find (20) Murphy guilty of receiving a criminal gratuity (Sec. 201 (g)), conflict of interest (Sec 203 (a)), and conspiracy (Sec. 371). Pursuant to the court's instructions, the jury did not return a verdict on the interstate travel count (Sec. 1952) since they found Murphy not guilty on the bribery count.[6]

Thompson was found guilty of bribery (Sec. 201(c)), criminal gratutity (Sec 201(g)), and conspiracy (Sec. 371). The jury found him not guilty on the conflict of interest charge (Sec. 203 (a)); Thompson was not charged with a travel act violation.

The key transaction in the Thompson-Murphy case was the transfer of $50,000 to Murphy in a briefcase on October 20, 1979. Under the court's instructions the jury's verdicts establish that each defendant knowingly received part of the money that was in that briefcase. The jury was instructed, "if a defendant did not receive part of that money then you must find him not guilty on this count (bribery) as well as on the other substantive counts."

Murphy did not testify, but through argument of counsel it was urged that Murphy did not know that there was money in the briefcase that was passed. Thompson did testify and claimed he knew nothing whatsoever of the

Murphy transaction and denied having ever received any of its proceeds. Both contentions were rejected by the jury, (21) which found each defendant guilty on some counts, and not guilty on others. Again, the videotape evidence against the defendants, corroborated by the testimony of Murtha and other non-government witnesses, established an overwhelming case. Weinberg and Amoroso provided their usual testimony linking together the various audio and video tapes.

(22)

III. PRETRIAL AND POST TRIAL PROCEEDINGS

Extensive pretrial motions were made by all defendants in all three of these cases. Representatives Myers, Lederer, Thompson and Murphy all claimed legislative immunity under the speech and debate clause of the constitituion, and pretrial appeals were heard by the Second Circuit on that issue. In all cases the district court's orders refusing to dismiss the indictments were affirmed.

The key decision was written by Judge Newman of the Second Circuit in US v. Myers, 635 F2d 932 (CA2), cert. denied, _US _, 101 SCt 364 (1980).

A number of other issues were raised by pretrial motion seeking dismissal of the indictment on grounds of governmental misconduct, denial of defendants' due process rights in the conduct of the investigation, entrapment as a matter of law, and various other issues which during the course of the proceedings have been loosely referred to as the "due process" issues.

All three of these cases were originally assigned to Judge Mishler of this court. In his original disposition of the "due process" motions Judge Mishler reserved decision on the ground that the motions could be dealt with more effectively after presentation of the government's case at trial. He indicated that if he found any merit to the ,23. due process claims, he would conduct a hearing between the government's case and the defendant's case and then decide

the questions raised. Four days before the Myers case was to go to trial, however, Judge Mishler excused himself and these cases were reassigned to the undersigned.

Just before the trial began the "due process" agruments were again advanced by defendants who reasserted their desire for a pretrial hearing. By that time, Judge Fullam in the Jannotti case in Philadelphia had conducted many days of pretrial "due process" hearings but had been unable to resolve the questions presented, which he finally reserved for post-trial determination. Under those circimstances, this court ruled that the due process hearing would be deferred until the jury in the Myers case retired to deliberate, and then any additional testimony that was required could be heard before the court sitting without a jury.

As matters developed, defense counsel in Myers argued persuasively that this court's modified plan was impractical; as a result, the "due process" claims of the convicted defendants in the Myers, Lederer, and Thompson cases were heard simultaneously in January and February

of 1981, at a consolidated hearing held shortly after the jury had found Lederer guilty.

(24)The Williams trial did not take place until April, 1981, after the first "due process" hearing had been concluded; consequently, a separate "due process" hearing was conducted in June, 1981, and the post-trial motions in Williams will be decided separately after counsel have had an opportunity to brief the issues. All parties in all four cases were given the opportunity on the "due process" issues to rely upon all of the evidence developed, not only before this court in both "due process" hearings and in all four trials, but also before Judges Fullam, Penn and Bryant in their respective trials and due process hearings, to the extent that such evidence might be brought to this court's attention before determination of the post-trial motions.

This court recognizes that the lengthy "due process" hearings permitted in these matters have extended well beyond what would be appropriate in the usual criminal case. Conscious decisions and express rulings were made permitting a wide-ranging scope of inquiry, seemingly

endless cross-examination by defense counsel of a seemingly endless testimony. In addition, the court ordered the government to produce many internal documents of the justice department and the FBI. At times the proceedings more resembled a series of depositions and requests for document production (25) in a securities fraud or antitrust case than a hearing to determine whether the government had violated the "due process" rights of defendants in a criminal prosecution. In most instances, even when the court had doubts about the suitability of a line of questioning or whether a document should be produced, decision was resolved in favor of the defendants.

There were substantial reasons for such liberality to defendants, unprecedented in this court's experience. In the first place, from the very beginning it was apparent that these were significant cases to the defendants, to the FBI, to the justice department, to the public, and perhaps even to the very structure of our governmental system. Large sums of money had been spent in the Abscam investigation. High-ranking members of Congress had been

indicted. The integrity of both the FBI and the justice department had been vigorously challenged. A novel investigative technique had been employed against members of Congress and others without prior specific suspicions.[7] And the entire matter had been given extensive national coverage in the news media, reflecting not only the importance of the criminal actions, but fundamental political and constitutional issues which many segments of the population had an interest.

(26) Second, since the United States Supreme Court has not yet expressly ruled on many of the legal issues presented, and the issues raised are novel questions of great public importance, final review by that body is a distinct possibility.

Third, it is advantageous for this court to have developed a complete record so that review on appeal can be final, without the need for a remand to develop further areas of possible inquiry. Already, enormous time and effort by all has been devoted to this case. Justice to the parties and to the public demands final resolution on one

trip through the appellate review system if that is at all possible.

Fourth, the political, professional and business careers of the defendants have been destroyed or at least seriously compromised by the indictments, trials and convictions. Whatever final sentences might be imposed, the harm to these defendants from the mere fact of the conviction was significant, thereby requiring meticulous review of every possible basis for vacating those convictions.

Fifth, although the cases before the undersigned were tried in the Eastern District of New York under the jurisdiction of the Second Circuit, all but one of the defendants reside in New Jersey or Pennsylvania under the (27) jurisdiction of the Third Circuit. A serious claim was made by most of the defendants that the government had wrongly manufactured jurisdiction in the Eastern District of New York by scheduling the payoffs in this district to the prejudice of those defendants who reside in the Third Circuit.

Seventh, the nature of the claims asserted by defendants — over-involvement of the government in creating

the crimes charged, specific governmental misconduct during the course of the investigation, and suppression of exculpatory information during the course of the investigation and trial -- dealt primarily with factors beyond the direct knowledge of the defendants, so that whatever evidence could be developed would have come by way of the hearing from government records and government witnesses.

(28) Eight, in the Abscam case tried in Philadelphia, US v. Jannotti et al., Judge Fullam had conducted further "due process" hearings after the convictions and had found reasons for dismissing the indictments there. US v. Jannotti, 501 F Supp 1182 (Ed Pa 1980) (appeal pending). See discussion of Judge Fullam's decision in section VII, infra. In the course of his "due process" hearings, Judge Fullam at many points foreclosed testimony about the New York cases, and restricted his inquiry to matters that bore directly upon the Philadelphia phase of Abscam, a phase that focused primarily on local officials during a period of some 10 days at the very end of the investigation. In the

present cases, which involved elected federal officials engaged in activities over some seven months, the need for a more wide-ranging inquiry seemed compelling.

In short, the procedures followed by this court and the rulings made throughout the course of the due process hearings were guided by a sensitive concern for the rights of these defendants, an awareness of the unsettled legal principles governing disposition of defendants' claims, and an appreciation of the public importance of the Abscam investigation in general and the conduct of these defendants in particular. Together, these factors persuaded the court that wherever possible, consistent with legitimate governmental needs for continued secrecy, open disclosure of (29) the Abscam investigation and the government's handling of it was both necessary and desirable.

As a result of the foregoing, the court has before it, and has considered in making this decision, all of the testimony developed in fourt weeks of the Myers trial, three weeks of the Thompson trial, one week of the Lederer trial, five weeks of the Williams trial, three weeks

of the first due process hearing, making altogether approximately 17 weeks of trial presided over by this court represented in approximately 20,000 pages of transcripts. In addition, the court has reviewed all of the testimony in the due process hearings before Judges Fullam, Bryant and Penn, as well as the due process hearing before Judge Penn, that counsel have focused upon. The many volumes of the FBI's Abscam files from both headquarters in Washington and the Brooklyn-Queens office were reviewed in camera, resulting in directions to the government to produce all or parts of many documents. The court has also reviewed and considered the government's pre-prosecution memoranda, the so-called "Del Tufo memorandum," the "Blumenthal report" on publicity leaks, a large number of video and audio tapes and transcripts, and hundreds of other exhibits.

30. The post-hearing memoranda of counsel consitute a stack of briefs some six inches high. An even larger stack of motion papers was created by the pretrial, prehearing, and mid-hearing submissions of counsel, many of which

were incorporated by reference into their final submissions. All of those papers have been read and carefully considered by the court.

With that background, the court next turns to an outline of the specfic claims of the parties and, finally, to a dicussion of the merits of those claims together with the court's findings and conclusions, where necessary, with respect to those claims.

(31)

IV. DEFENDANTS' CLAIMS

A. Claims of the Myers Defendants.

The four defendants in Myers have filed joint briefs in support of all post trial motions and thus their arguments are referred to collectively. The Myers defendants essentially claim the the Abscam investigation did not uncover criminal conduct, but instead created or instigated any criminality that may be present, and that imporper delegation of authority, lack of supervision, inadequate documentation and the reward system used by the government

created such doubt as to the truth, reliability and integrity of the verdict as to require dismissal of the indictments. The Myers defendants urge, in effect, that notwithstanding their failure to claim entrapment at the trial, they are not precluded from now asserting a defense of "entrapment as a matter of law," or "objective entrapment". They urge that many states have recognized and legislatively adopted objective entrapment and that the federal courts should constitutionalize that trend.

More particularly, the Myers defendants argue that the government did not infiltrate or uncover ongoing criminal activity, but instead created such activity; that the government offered overwhelming inducements to the Myers defendants; that Abscam was conducted without adequate (32) safeguards, particularly with respect to supervision of Weinberg; that the techniques employed by the government in Abscam were "outrageous" within the meaning of Hampton v. United States, 425 US 484 (1976); that there was entrapment as a matter of law; that the compensation of Weingberg as an informant is unconstitutional; that it is

improper to undertake a general investigation into the corruptibility of members of a particular branch of government without some "well-grounded basis;" that as a matter of constitutional law the "so-called due process defense or objective strand of the entrapment defense" should be available to a defendant subjected to "outrageous governmental investigatory action;" that the destruction, erasure or unexplained loss of tapes requires an inference that the tapes contained exculpatory material; and that in an undercover investigation the verbal assertion by a potential target that he or she desires to act within the law forecloses any further investigation of that individual.

B. Thompson's Claims.

Defendant Thompson advances arguments that are similar, although more focused. He urges what he characterizes as "the doctrine of governmental overreaching" as requring dismissal here because the government instigated rather than discovered the crimes and because its selection of "targets" was arbitrary and unprincipled. Thompson (33)

further urges that the indictment should be dismissed because in the course of the Abscam investigation there were widespread and continuous violations of laws, regulations and guidelines in the control and monitoring of the informant Weinberg, in using in Criden and other "middle men," in lacking reasonable suspicion before bringing public officials before the video cameras, and in ignoring or disregarding "red flags" and substantial legal questions that arose. Thompson further argues that inadequate documentation of the investigation, unauthorized disclosures of information to the press by the government, attempts by the government to intimidate witnesses, failure to observe the requirements of Brady v. Maryland, 373 US 83 (1973), and other possible violations of law require dismissal of the indictment against him. Finally, Thompson urges that the circumstances of his involvement with Abscam constitute entrapment as a matter of law.

C. Murphy's Claims

Defendant Murphy argues that the government's conduct of the Abscam investigation violated principles of

fundamental fairness because the justice department targeted congressmen in violation of principles of separation of powers and the speech or debate clause, failed to take into account the nature of Murphy's duties as a legislator, and failed to consider the right of all citizens to petition Congress and Congressman Murphy for redress of grievances. (34) Murphy further argues that his prosecution was the product of governmental overreaching in the creation and promotion of crime and that the government's outrageous creative activity was designed to lure Murphy into criminality without any indication of his predisposition or prior agreement to engage in wrongdoing. He further argues that as to him the government deliberately or recklessly created ambiguous and misleading evidence of criminality. Murphy's final argument focuses upon claimed misconduct by the government in the Abscam investigation anbd prosecution, and argues that the misconduct caused him specific prejudice. He contends that dismissal of the indictment would not harm any legitimate law enforcement purpose,

but on the contrary would serve as a deterrent against any future Abscam-type abuses.

D. Lederer's Claims.

Defendant Lederer claims he was deprived of due process and that he was the victim of entrapment as a matter of law because Abscam constitutes outrageous conduct on the part of government agents in that they created rather than discovered crime; allowed Weinberg and Amoroso to act in an uncontrolled fashion; manufactured jurisdiction over defendants; selected a venue that would avoid the Third Circuit's decision in US v. Twigg, 588 F2d 373 (CA3 1978); provided improper incentives for Weinberg; appealed (35) to the civic duty of targets to involve thim in Abscam; improperly used "middle men"; attempted to mislead the court and jury about the creation of the "asylum scenario;" permitted an FBI agent, the government prosecutor and Weinberg to separately contract to write books about Abscam; failed to safeguard against entrapment; trapped Lederer into giving a false

statement to the FBI; withheld evidence of Weinberg's criminal record; leaked untruthful stories to the press in order to interfere with cooperation among codefendants; destroyed evidence; withheld prior statements of Amoroso and Weinberg; violated the principles of Brady v. Maryland, 373 US 83 (1973); and instructed agents to testify falsely and to withhold information at the trial. Lederer further argues that he was entrapped as a matter of law.

E. Claims of the Government.

The government argues that the Abscam investigation in its totality was both appropriate and constitutional, that the rights of none of the defendants were violated by the investigation and that there was no exculpatory evidence withheld from the defense. In the government's view, all of the defendants' "due process" contentions basically fall into two categories, neither of which has validity: governmental "over-involvement" in the creation of criminal activity, and the government's failure to take measures (36) to ensure that innocent people would not be wrongfully

ensnared and convicted. The government urges that defendants' claims

> cannot be considered in the abstract, for the facts as developed at the trials reveals ,sic. a collection of unscrupulous public officals who were never "victimized" by the informant or the intermediaries and whose guilt was clear because they were clearly guilty, not because they had been manipulated to appear in compromising positions before the cameras.
>
> Government's memorandum at 1.

The government further argues that the Abscam investigation was pursued in good faith and conducted professionally in view of the circumstances, that no right of any defendant was infringed and, finally, that whether an operation such as Abscam is "good" or "bad" is a matter to be decided initially by the executive branch of our government, subject to legislation by Congress, but does not present judicial questions under the due process clause.

As an alternative to dismissal of the indictment, all defendants also move for a new trial on various grounds, including insufficient evidence, errors in the charge, and Brady violations. See section IX, infra. (37)

V. GENERAL DISCUSSION OF BASIC LEGAL CONCEPTS

Whenever government agents, in carrying out their law enforcement functions, assist criminals or participate with them in their criminal activity, questions arise as to the propriety or legitimacy of the government's conduct and as to whether the law should punish a person for engaging in governmentally instigated criminal activity. the answers must draw on considerations of philosophy, psychology, statutory construction, constitutional law, practical needs of law enforcement, and even undifferentiated visceral feelings about right and wrong.

A. Entrapment

Much of the judicial discussion of these questions has focused on the ideas generally encompassed in the concept "entrapment". Although virtually all judges have agreed that an innocent person who was "entrapped" by government agents into committing a criminal act should not be convicted, there is less agreement on the proper principles

underlying the concept of entrapment and on what factors do or do not constitute entrapment.

Under the so-called "subjective" approach to the defense of entrapment, two factors must be considered: Was the defendant's criminal conduct "induced" by the govern-
(38) ment agent? If it was, was the defendant "predisposed" to commit the crime? This subjective approach focuses upon the conduct and propensities of the particular defendant in each case. It is for the jury to determine, first, whether there is sufficient evidence of "inducement" and, if so, whether the government has proven beyond a reasonable doubt that the defendant was "predisposed".[3] In theory, the subjective approach to entrapment is grounded in legislative intent: if an otherwise innocent person was entrapped by a government agent into performing a criminal act, the legislature never intended that his conduct be punished. Sorrells v. US, 287 US 435 (1932); US v. Russell, 411 US 423 (1973).

"Objective" entrapment is a term applied to either of two different concepts. Under one view of "objective"

entrapment the focus is not upon the propensities and predispositions of the individual defendant, but instead upon an objective standard of "persons who would normally avoid crime and through self-struggle resist ordinary temptations," Sherman v. US, 356 US 369, 384 (Frankfurter, J., concurring), in order to determine whether the inducement tendered by the government agent was unacceptable.[9]

The second view of "objective" entrapment focuses upon the conduct of the government agents in each particular case to determine whether that conduct of the government "falls below standards, (40) Sorrells v. US, 287 US 435 (1932). The Supreme Court has divided sharply on the standards to be applied in reviewing the conviction of a person whose criminal conduct was in part facilitated by government agents. In US v. Russell, 411 US 423 (1973), a Supreme Court majority of five claimed to adhere to Sorrells as a precedent of long standing that had already once been reexamined and impli-

city reaffirmed in Sherman v. US, 356 US 369 (1958). Writing for the court in Russell, Justice Rhenquist pointed out that "since the (entrapment) defense is not of a constitutional dimension, congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." 411 US at 433 (footnote omitted).

Four Supreme Court decisions are central to the issue of entrapment. Sorrells, 287 US 435; Sherman, 356 US 369; Russell, 411 US 423; and Hampton, 425 US 484. Familiarity with the majority, concurring, and dissenting opinions in those decisions is assumed. From those decisions as a whole it appears that the "objective" view has never been accepted by a majority of the Supreme Court. The "subjective" view has been adopted in Sorrells, Sherman and Russell and appears to be still acceptable to a present majority of the current Supreme Court bench, at least in most cases, where a defendant's predisposition has been established. (41)

Hampton presents a more complex picture. There, three justices voted to solidify the subjective approach so

that under no circumstances, regardless of how egregious the governmental conduct, could a defendant who was found by a jury to have been predisposed to commit the crime have the indictment dismissed for governmental misconduct. 425 US 484. Three other justices believed that the circumstances showed that governmental officials had purposefully created the crime in Hampton and that such creative activity by governmental officials required dismissal despite defendant's predisposition to commit the crime. 425 US at 495 (Brennan, J., dissenting). Two other justices in an opinion written by Justice Powell found that Hampton was controlled by Russell, that Hampton had not even raised the issue of predisposition, and that his entrapment defense, therefore, failed for lack of proof. 425 US at 490(Powell, J., concurring). Justice Powell declined, however, to close the door entirely upon the possibility of court intervention in an extreme case. He refused to accept the premise "that, no matter what the circumstances, neither due process principles nor (the Supreme Court's) supervisory power could support a bar to

conviction in any case where the (42) Government is able to prove predisposition." 425 US at 495. In footnote, Justice Powell added:

> I emphasize that the cases, if any, in which prooof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses which are so difficult to detect in the absence of undercover Government involvement. One cannot easily exaggerate the problems contronted by law enforcement authorites in dealing effectively with an expanding narcotics traffic * * * which is one of the major contributing causes of escalating crime in our cities. * * * Enforcement officials, therefore, must be allowed flexibility adequate to counter effectively such criminal activity.
>
> 425 US at 496 n. & (citations omitted).

Thus as the Court divided in Hampton, with Justice Stevens taking no part: three judges would make predisposition entirely; and the decisive two concurring votes, expressed in Justice Powell's opinion, indicate that predisposition is not only relevant but will be dispositive in all but the "rare" case where police over-involvement in the crime reaches "a demonstrable level of outrageousness". Since Hampton had been predisposed, and since the police

involvement in his crime was not "outrageous," his conviction was affirmed. The three dissenting judges would eliminate consideration of predisposition entirely and would instead devote their attention only to governmental misconduct. While they would prefer to be more restrictive of permissible governmental involvement in crime than Justice Powell's test of "outrageousness," the dissenters' position a fortiori accepts the "outrageousness" standard, making it the point in the continuum of escalating police involvement in crime where five members of the present court agree that a conviction should be overturned and an indictment dismissed.

Until further word from the Supreme Court, therefore, as a matter of strict legal precedent, this court must assume that while the subjective view of entrapment is the general guide, it is nevertheless subject to an overriding exception that under either the court's supervisory power[10] or the due process clause, a predisposed defendant cannot be convicted if police over-involvement in his crime reaches " a demonstrable level of outrageousness." See US v. Johanson, 565 F2d 179, 181 (CA 1 1977).

B. Outrageousness.

What conduct by law enforcement officials would be "outrageous"? No clear standard has evolved. Many partially relevant factors have been discussed, argued, and either accepted or rejeceted in various opinions on the subject. The court has reviewed and carefully considered numerous cased, (44) including the following: (1) United States Supreme Court: Sorrells v. US, 287 US 435; Sherman v. US, 356, US 369; US v. Russell, 411 US 423; Sherman v. US, 425 US 484; (2) Second Circuit of Appeals: US v. Viviano, 437 F2d 295 (CA2), cert. denied 402 US 983 (1971); US v. Nunez-Rios, 622 F2d 1093 (CA 1980); US v. Corcione, 592 F2d 111 (CA2 1979); US v. Archer, 486 F2d 670 (CA2 1979); US v. Brown, 603 F2d 1073 (CA2 1979); (3) Cases from other circuits: US v. Smith, 538 F2d 1359 (CA9 1976); US v. Quinn, 543 F2d 640 (Ca8 1976); US v. Graves, 556 F2d 1319 (Ca5 1977), cert. denied, 435 US 923 (1978); US v. Leja, 563 F2d 244 (CA6 1977), cert. denied, 434 US 1074, 436 US 948 (1978); US v. Johnson, 565 F2d 178 (CA1 1977), cert.

denied, 434 US 1075 (1978); US v. Twigg, 588 F2d 373 (CA3 1978); US v. Szycher, 585 F2d 443 (Ca 10 1978).

Of all the foregoing cases, only one, the Third Circuit's decision in Twigg, has actually held that an indictment should be dismissed under the supervisory power of due process clause because governmental conduct was "outrageous". Although most of the other cases recognize the possibility of such a conclusion, none of them has held under the circumstances presented to the court that dismissal of the indictment was an appropriate remedy.[11]

(45) The central issue now tendered by defendants in this case is whether the circumstances of the Abscam investigation and the government's conduct toward the particular defendants reached "a demonstrable level of outrageousness" sufficient to require dismissal of the indictments. Before addressing the circumstances of Abscam and the particular problems of these cases, however, it may be useful to list many of the factors that have been the focal

point of discussion in the cases cited by counsel. Among those factors are the following:

1. Did the government agents initiate or instigate the criminal activity?

2. Was the government's participation essential to the crime?

3. Had the defendant engaged in similar criminal activity before the government agent came on the scene?

4. Was the activity of the government agent, when viewed alone, criminal?

5. How easy or difficult is the job of law enforcement officers in combatting the kind of criminal activity involved? (46)

6. Do the police need to use the kinds of tactics utilized in order to effectively detect the crime?

7. Did the government provide the instruments or implements (e.g., drugs, laboratory equipment, chemicals, money, suitcases) to commit the crime?

8. If an informant was used, was the informant reliable? Did he have a criminal record?

9. Was the informant paid a fee contingent upon the number or importance of defendants apprehended or convicted?

10. Did the informant violate the law, or urge others to violate it?

11. Did the informant or the undercover agents exert pressure or use threats on defendants to induce them to commit the crime?

12. Did the informant of the undercover agents engage in other activities, not directly related to the crime, which violated the law or were dishonorable?

13. Did the government agents show a proper regard for judicial and police processes? (47)

14. Did the government's agents perjure themselves by false reports to the police, to a judge, or to a grand jury?

15. Did the activities of the agents actually harm innocent citizens not the subject of the investigation?

16. Did the activities of the government agents have any direct adverse social consequences?

17. Did the undercover agents stand by while crimes were being committed in their presence?

18. What was the value to law enforcement of the information being obtained by the informant and undercover agents?

19. How important was the crime and its detection in the overall social scheme?

20. How closely were the informant's activities supervised by the government agents?

21. Was the claimed outrageous conduct of the agents an isolated instance, or was it part of a widespread and continuous system?

22. Did the investigative technique complained of produce a substantial danger of unreliability and thereby (48) potentially expose innocent people to prosecution and possible conviction?[12]

Although there are some indications from some dissenting justices in the United States Supreme Court that undercover activities, deception, trickery and similar techniques by police should be impermissible under our consti-

tution, the great majority of opinions on the subject, and all holdings by the Supreme Court and, as far as this court is aware, by the circuit courts as well, have recognized that in order to combat crime in our society it is permissible for police to employ artifice and strategem, to use undercover agents who deal directly with criminals, and to present opportunities and facilities to them for the commission of an offense. (49)

SPECIFIC DISCUSSION OF DEFENDANTS' CLAIMS

We turn now to a discussion of the merits of the defendant's claims. For discussion purposes the claims will be divided into four groups:

A. General Nature of Abscam.

B. Specific Operations of Abscam.

C. Weinberg and His Conduct.

D. Miscellaneous Arguments.

A. General Nature of Abscam.

1. Objective Entrapment and Entrapment as Matter of Law.

All defendants urge, as a primary contention, that the indictment should be dismissed because the Abscam investigation did not uncover criminal conduct, but instead created and instigaged it. This argument challenges the essential nature of the government's "sting" operation, which presented to defendants a false and fictitious but convincing "scenario" of a wealthy sheik willing to pay cash for promises of assistance in his immigration to the United States. Defendants argue that this scenario induced them to participate in criminal events they otherwise would not have engaged in, simply because absent the government's (50) actions they would not have had the opportunity to do so --at least with this sheik.

The central defect in defendants' arguement is that is simply does not represent the law as established by the United States Supreme Court. As noted in the "general discussion," section V, supra, eloquent dissents have urged that objective entrapment be adopted as a constitutional

principle so that whenever a government agent provided the impetus for a crime, prosecution would be barred. If that were the law, clearly these convictions would have to be dismissed; indeed, if that were the law, these prosecutions would never been brought. However, and as already noted, whenever the dissenting or concurring justices on the Supreme Court have urged objective entrapment as a principle of constitutional law or as a basis for invoking the supervisory power, see Hampton, 425 US 486; Sorrells, 287 US 435; Russell, 411 US 423; and Sherman, 356 US 369, the majority has rejected the concept. Thus, except for the possible availability of an "outrageous governmental conduct" argument, discussed below, defendants' entrapment claims in these cases are restricted to principles of subjective entrapment, where the creative activity of the government entraps into criminal conduct a defendant who was not predisposed to commit the crime. As already noted, the focus of this defense is upon whether the defendant was predisposed to commit the crime.

Predisposition is generally a question of fact to be determined by the jury. Of all the defendants before the

court in these three cases, only defendant Lederer requested that the issue of entrapment be submitted to the jury, and, of course, the jury found him predisposed, a decision that cannot be overturned because it is supported by sufficient evidence. Since the other defendants did not request an entrapment charge, the issue of subjective entrapment is no longer open to them.[13]

Substantial parts of the memoranda submitted by the Myers defendants focus upon why this court should apply the principles of objective entrapment. But in view of the consistent position taken by the United States Supreme Court against the arguments of its dissenters, it would be improper for this court to decide these cases by adopting objective entrapment. Presumably, the Supreme Court could overrule its clear precedents to the contrary and impose such a fundamental change on our criminal justice system. Similarly, it is within the province of Congress to define the entrapment defense in objective terms, and the fact that a number of states have done so might be persuasive argument to a legislator. But the argument is

unpersuasive to this district judge in light of the clear federal precendents that reject objective entrapment.

2. "Outrageous" Government Conduct.

Even if objective entrapment is not to be the standard, defendants argue, these indictments should be dismissed because the government's handling of the investigation was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." This argument stems from Russell, 411 US at 431-32, where Justice Rehnquist, speaking for the majority, acknowledged that such a situation of "outrageous" conduct "may some day be presented". Justice Rehnquist repeated that thought in Hampton, 425 US at 489.

It is important to recognize, however, that in neither Russell nor Hampton was the questioned governmental conduct held to be "outrageous". Nor has any other decision of the Supreme Court found law enforcement officers' conduct to be so "outrageous" as to require

dismissal of an indictment. Thus, even though Supreme Court has yet to be confronted with or to offer a description of circumstances sufficiently outrageous to warrant dismissal, the governing principle remains that in some case, under some circumstances, the conduct of law enforcement officials may some day bar prosecution. (53) Defendants argue that those cases, those circumstances and that conduct have arrived with Abscam.

It is clear that mere instigation of the crime does not render law enforcement activity "outrageous". Here, the government presented a fictitious sheik, seeking to buy favorable legislative action. Undercover agents offered money in return for defendant legislatures' promises to introduce a private immigration bill. In simple terms, bribes were offered by the undercover agents and accepted by the defendant congreemen.[14]

Clearly, the government agents created the opportunity for criminal conduct by offering the bribes. But their involvement falls far short of being "outrageous" for two reasons. In the first place, each of the legislatures could

simply have said "no" to the offer. US v. Myers, 635 F2d at 939. Three other legislatures faced with identical offers, Senator Pressler, Congressman Patten and Congressman Murtha did precisely that as shown by the videotapes in evidence as DP Exs. 22, 21, and Thompson trial Ex. 29. Second, the extent of governmental involvement here is far less than in Hampton, where the government not only supplied heroin for the defendant to sell, but also produced an undercover agent to buy it from him. Even under those circumstances, where the government was active on both sides of a narcotics sale, the Supreme Court did not consider (54) the agents' conduct to be "outrageous;" a fortiori here, where the agents acted only on one side, by offering money to congressmen in return for favors, the involvement of the undercover agents was not "outrageous."[15]

3. Selection of "Targets".

Defendants argue that Abscam was "outrageous" because its selection of congressional targets was arbitrary

and unprincipled. Early in the first due process hearing this court stated that in the absence of evidence to the contrary it would assume that there was no "probable cause" or even "reasonable suspicion" which might be used as a predicate for making a bribe offer to any of the defendant congressmen. No evidence is before the court that any of the defendant congressmen committed any prior similar violations or engaged in any course of conduct or other circumstances that would warrant suspicions of criminality in the conduct of their legislative affairs.[16]

Under these circumstances, defendants argue, to permit targets to be selected by middlemen violated due process because it did not provide sufficient protection to the innocent. Both legally and factually the argument fails. On the legal side, Judge Newman noted on the earlier appeal in Myers that the constitution does not require reasonable suspicion before a congreeman may be made the (55) subject of an undercover sting. US v. Myers, 635 F2d at 940-41. See also US. v. Ordner, 554 F2d 24 (Ca2 1977).

Factually, too, the argument is undercut by what happened with representative Patten and Senator Pressler, who had been brought to the undercover agents by middleman Silvestri. DP Exs. 21 & 44, respectively. Neither one apparently knew he had been brought before the sheik's representatives to be offered money in return for a promise of favorable legislative action. However, neither one was overwhelmed by the circumstances, and each declined the offer. Pressler, particularly, acted as citizens have a right to expect their elected representatives to act. He showed a clear awareness of the line between proper and improper conduct, and despite his confessed need for campaign money, and despite the additional attractiveness to him of the payment offered, he nevertheless refused to cross into impropriety.

The court is convinced that the defendant congressmen appeared through a "self-selecting" procedure that involved the other defendants as well. The agents did not set out to offer bribes to any particular congressman. They set no standards, established no criteria. Instead, the middlemen,

Errichetti, Criden and Silvestri, carried the word that money was there for the taking by any congressman who would promise to give legislative aid to the sheik's (56) need for asylum in the United States. Weinberg's description of Abscam accurately characterizes what happened: "We put out the word that money was available, we had a honey pot and the flies came." Schwartz Trial Tr. 2.65 (Sept. 11, 1980).

Uncontroversial testimony established that no prospect was rejected or vetoed either by the agents or by higher authorities in the justice department. No congressional defendant was forced to attend the videotaped meeting, and no congressman was contacted directly by any of the undercover agents. Prior to the payoff meetings all contacts with the congressmen were through the middlemen, who apparantly believed the sheik's offer, who claimed to have influence with the congressmen willing to take bribes. With the convicted congressmen, these claims proved accurate: with some other legislators, the middlemen did not live up to the abilities they had boasted of. In

some cases, as noted above, after the legislator appeared, he rejected the offer of money.

With each defendant brought before the TV cameras, the criminal nature of the proposed deal was made clear. Each of the congressmen was a sophisticated politician who clearly was aware what was being requested of him and what the money was being offered for. While Amoroso and Weinberg talked around that point somewhat and did not mention (57) the word bribe in the on camera discussions, they handled the matter in each case as tactfully and delicately as one might suppose, given the nature of their undercover role as agents of foreign principles offering a bribe to a high public official.[17] But, as the videotapes clearly showed and as the juries necessarily concluded, each congressman was aware of the criminal nature of the transaction, and each acted wilfully.

The claim that the justice department "targeted" only supporters of Senator Kennedy in his presidential race was unsupported by the evidence.

In short, on this record it is clear that those defendants who appeared and accepted bribes were not "targets"

in the sense that any government agent selected them for some sort of "honesty test;" instead, each was a willing volunteer seeking illegal and corrupt payments.

4. Size of Inducements.

All of the defendants argue that the inducements offered to the congressmen were overwhelming, designed to overpower their otherwise adequate resistance and to induce honest and innocent people to commit a crime they would normally avoid.[18] Congressmen Myers, Lederer, Thompson and Murphy were each given $50,000. In addition, each was told that the sheik would invest money in the congressman's district. (58) The inducements were clearly improper in the case of the cash payments, although arguably proper in the case of promised investments. Even with the investments, however, at least some of the congressmen seemed more interested in obtaining deposits in favorite banks than in truly developing the resources of their own districts. With Murphy, moreover, there was the added transaction of a contemplated loan to enable him and his business partner to buy a shipping company.

In another Abscam matter relating to a new gambling casino, Errichetti is alleged to have recieved part of a $100,000 payment made by the undercover agents. In addition, he seems to have been promised a lucrative job with the casino once it opened. Criden first contacted the undercover agents when he sought financing for a casino; if successful, he and his law firm would have received a fee that ran in seven figures. Later activities by both Errichetti and Criden demonstrate, however, that they produced bribe-taking congressmen because of the cash they received as part of the payoff. There is no evidence to connect their motivations for these crimes with their hoped-for bonanzas if the casino project went ahead. Certainly none of these defendants were in the position Judge Fullam found Jannotti and Schwartz to be in: "either take the bribe or lose investment for your community." (59) while there may be "inducements" that are "overwhelming," such as a threat against the life of a loved one, when the inducement is nothing but money or other personal gain, this court does not believe that the size of the

inducement should be a determinative factor in whether a public official can be prosecuted for accepting it. No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court, that "every man has his price;" but when that price is money only, the public official should be required to pay the penalty when he gets caught. In short, as a matter of law, the amount of the financial inducements here could not render the agents' conduct outrageous or unconstitutional.

But even if the size of the inducements were relevant, on the facts here they do not approach "overwhelming." The undercover agents were dealing with members of Congress, sophisticated people who function at the highest level of our government. In these inflationary times, $50,000 is simply not an overpowering sum of money. The agents sought to keep the bribes reasonable and realistic in light of all the circumstances, and the sheer length of time Abscam ran without raising suspicions or being (60) exposed

testifies to the agents' success in making all aspects of the bribe offers seem real.

Moreover, there were several participants in each of these transactions, so the amount of bribe money each congressman could expect to actually receive varied from between $5,000 and $20,000. Furthermore, it is evident that the inducements offered were not so great as to cause every official who appeared before the cameras to agree to commit a crime, because Senator Pressler, Congressman Patten and Congressman Murth all refused. Nor do we know how many congressmen, if any, were approached by the middlemen, offered the $50,000, and refused outright to even visit with the sheik's representatives to discuss the matter. Taken together, all these factors make it clear that the inducements offered were not overwhelming. The difference between those public officials who took bribes and those who refused cannot be found by examining the inducements offered. Honest congressmen would refuse a bribe offer; dishonest ones took the money.

Judge Fullam, in his due process ruling in Jannotti,

found the inducements offered by the government to be so "attractive" and "exceedingly generous" that defendants' acceptance of the money could not establish proof of predisposition, and he therefore held that the inducements resulted in entrapment as a matter of law. It may be that he reached (61)

that conclusion because the bribe money was forced on defendants by threats of withholding the hotel investment, a substantial benefit to their city, if defendants did not take the money. To the extent that Judge Fullam may have felt that the amount of a bribe offer, standing alone, may insulate its recipient from prosecution, this court respectfully disagrees.

5. Need for the Investigative Tactic.

A vital factor in evaluating the government's conduct is whether there was any particular need for the kind of investigative tactic employed. The Supreme Court has recognized with drug-related offenses that undercover activities by governmental agents is necessary for proper law enforcement:

> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present

> practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken (62) into confidence of the illegal entrpreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental faieness" or "shocking to the universal sense of justice."
>
> US v. Russell, 411 US at 432 (citation omitted).

Although discovered and prosecuted less frequently than drug trafficking, political corruption through bribery is regrettably found among public officials, not only in this country but abroad. While this court is not prepared to characterize the bribery of public officials as "a continuing, though illegal, business enterprise," clearly it is not simply a "sporadic, isolated criminal incident". Like drug offenses, bribery is difficult to detect. Both are "victimless crimes" in the sense that no one with knowledge of the usual transactions has a motive to report the illegality to law enforcement officials.

Moreover, with bribery, nothing more is required than the quick passing of money in return for a promise of performance by the public official of an act that appears

to be an appropriate part of his public duties. With drug deals, at least one part of the transaction is clearly illegal -- the contraband. With bribery, both parts of the transaction are apparently legitimate: (1) money and (2) actions by public officials. Detecting bribery, therefore (63), it is probably even more difficult than detecting drug offenses.

Some would say, however, that mere difficulty of detection does not create a need for undercover, infiltrating tactics such as were used in Abscam. More is needed, specifically a serious harm to society, and there are those who would argue that bribery and corruption in our public officials should be viewed with a tolerant "boys will be boys" attitude. This argument the court rejects categorically. Honesty, integrity, truthfulness and sincerity are essential qualities for effective leadership in our society. Tolerance of coruption has no place here. The cynicism and hypocrisy displayed by corrupt officials, pretending to serve the public good, but in fact furthering

their own private gain, probably pose a greater danger to this country than all of the drug traffickers combined. Corrupt leaders not only betray their constituents, but also contribute to a moral decay in American society that many view as the forerunner of economic, political and social disaster.

This court believes that the great majority of government officials, including those in Congress, are honest, hard-working, dedicated and sincere. However, the government needs to have available the weapons of undercover operations, infiltration of bribery schemes, and "sting" operations such as Abscam in order to expose those (64) officials who are corrupt, to deter others who might be tempted to be corrupt, and perhaps most importantly, to praise by negative example those who are honest and square-dealing. Without the availability of such tactics, only rarely would the government be able to expose and prosecute bribery and other forms of political corruption.

6. Lack of Reliability.

One of the central notions running through the concepts of entrapment, governmental over-involvement in crime, and due process violations for "outrageousness" is a deep judicial concern that juries' convictions be reliable measures of defendants' culpability. Courts must intervene when a conduct by a government agent, or for that matter by any other person, creates a substantial risk that the "guilty" verdict is not a reliable evaluation of what a defendant did.

With these Abscam verdicts, reliability is high. In each of these cases the essence of the government's case was found on the videotapes. The full meetings with congressmen were recorded from start to finish, with no editing of the tapes either during or after the meetings. A more reliable basis for conviction can hardly be imagined. Through the videotapes the juries were permitted to see the actual crimes committed. Compared to the ordinary trial (65) where oral testimony can at best only partially recreate an event, the reliability of the Abscam evidence

was increased many times over.[19] Not only was there no question of the actual words used by the participants, but the jury could also perceive the added dimensions of tone of voice, timing of comments, and even the defendants' gestures and mannerisms. The issue of "credibility," determining whether the events occurred as the government contends, an issue that dominates so many criminal trials, was virtually eliminated from these trials. Thus, there is absent from the reliability calculus one of the major hazards to truth and justice that is present when only oral testimony recreates the events.

Finally, review of the tapes in each case confirms that the jury was not only authorized, but virtually compelled to find each of the congressional defendants guilty.

B. Specific Operation of Abscam

1. Inadequate Safeguards.

Defendants argue that Abscam was conducted "without adequate safeguards," particularly with respect to the supervision of Weinberg. They point out that during

the more than one year of Abscam's operation, Weinberg was accompanied by agents Amoroso or McCarthy only half the (66) time, and that the rest of the time he was free of government supervision.

There are several flaws in this argument as ground for attacking the convictions. In the first place, none of the defendants has shown any direct or specific harm resulting from the alleged lack of supervision. Defendants' claims in this regard are amorphous and unfocused. Perhaps they can best be viewed as generalizations or characterizations to be applied to the other specific instances of misconduct charged to Weinberg discussed below.

Second, defendants cite no authority holding that the constitution requires the FBI to impose a particular degree of supervision on an informant.

The third flaw in the argument is that even though a lack of supervision may connote a defect in an investigation, the only relevant question is whether ultimately that defect affected the reliability of the

result, and as shown in the discussion of reliability, Section VI-A-6, supra, on this point the government rates well.

The fourth defect in this argument is factual, for the supervision imposed on Weinberg was more than adequate to the circumstances of this investigation. Weinberg recorded literally hundreds of conversations and telephone calls outside of the agents' presence. While Weinberg was (67) given some discretion as to what calls to record, this court is satisfied that he exercised that discretion by recording all calls and conversations that he could consistently with safety and convenience. There is no evidence presented by any of the defendants that a particular phone call or conversation exonerated him or that the lack of a particular recording in any way prejudiced him.

Undoubtedly, there were many unrecorded phone calls and conversations in which Weinberg participated over the many months of the investigation, but the evidence shows no pattern or purpose to them that would warrant an inference of misconduct or evil intent. Nor does the

constitution demand that the FBI or informant record every conversation with a subject. Preserving evidence in electronic form may add credence to the government's case, but failure to record raises no constitutional defect; it does no more than possibly reduce the persuasive quality of the government's case in the eyes of the jury.

Moreover, and contrary to defendant's assertions, Weinberg was supervised extensively by the FBI. In an investigation that spanned many months and meetings all along the east coast, Weinberg was in virtually daily contact with Amoroso, and his recordings were delivered to the FBI for transcribing on a periodic basis. Most importantly, the key events on which the government relied in presenting its cases, the appearances before the videotape cameras, (68) took place in the presence of the FBI agents, and occasionally under the direct supervision of an attorney from the Eastern District Strike Force. Beyond that, supervising agent Good and strike chief Puccio continually monitored the progress of the investigation, and each reported regularly to their respective superiors in

the bureau and the Department of Justice.

Finally, the ultimate "safeguard" in these cases was that the central part of the criminal conduct charged to each congressional defendant was recorded on videotape so that the jury could directly interpret, assess and evaluate its every nuance, its full flavor, its pervasive aura of corruption.

2. Missing Tapes.

All tapes argue in one way or another that entire tapes or parts of tapes are "missing". This argument is directed not to any videotapes, but only to audiotapes, most of which were recorded by Weinberg. In some instances, entire conversations were not recorded; Weinberg explained that he sometimes had conversations over the telephone when his recorder was not available, and that at other times he did not have blank tapes available. On occasion Weignberg recorded over a previously recorded conversation (69) that he regarded as unimportant. There is no evidence that the recordings thereby erased were

anything but what Weinberg judged them -- as unimportant. Once when he was flying to New York from Florida, a number of tapes, less than 10, were stolen from his flight bag, an incident he promptly reported to Amoroso. With some conversations the recorded portion does not begin until after the conversation had obviously begun; with others, the recorded portion ceases before the conversation ends.

All of these claims add up to an assertion that not every conversation during Abscam during Weinberg and various subjects was preserved in a recording. As already discussed, [20] however, this is not a constitutional defect. While it offered to defendants an argument to the jury as to the credibility of the government's case, the argument did not prove to be persuasive.

The Myers defendants argue, in addition, that the "missing" tapes require an inference that they contained exculpatory material. However, they explain neither what effect the inference should have nor in what way unrecorded conversations could exculpate any of the defendants. Nor did they request such a charge to the

jury.[21]

Perhaps defendants seek a "per se" rule that whenever a law enforcement agent fails to record a conversation (70) the defendant automatically must be acquitted on the presumption that the unrecorded material would have rejected out of hand as frivolous. Trials are a search for truth and fairness, not a game to be run by automatic, unrealistic rules. Absent even a hint of what benefit to defendants to the information on the "missing" tapes would offer, the effect of any "missing" tapes ceased to be relevant upon the return of the juries' verdicts.

3. Verbal Insulation.

The Myers defendants argue that when a potential target in an undercover investigation merely states that he desires to act within the law, the government should be automatically foreclosed from any further investigation of him. Presumably, the basis for this argument is the law's concern that an innocent person not be unlawfully entrapped into criminal conduct.

Defendants' argument goes too far, however. If adopted, it would provide a corrupt politician easy insurance against any undercover investigation, for when the suggestion of improper was raised, all the subject would have to do would be to invoke the magic incantation "I desire to act within law" and the plunge into his nefarious activities, confident that thereafter any (71) statements or conduct by him would be immune from investigation. Such a per se rule would soon frustrate virtually all undercover law enforcement.

As presently viewed by the Supreme Court the law protects the innocent in an undercover investigation, not by honoring incantations of "verbal insulation," but my making available the defense of subjective entrapment to be determined by a jury, the court to set aside any conviction obtained by "outrageous" government conduct that disregards principles of fundamental fairness. It is not "outrageous" merely because the agents did not cease their efforts immediately

of honesty.

4. Violations of Laws, Regulations and Guidelines.

Defendants argue that dismissal of the indictments is required because in the course of Abscam and the government engaged in widespread and continuous violations of laws, regulations and guidelines. Significantly, they do not point to violations of the constitutions, nor do they relate any of the claimed violations to any particulare constitutional rights of these defendants. Instead, their arguments are aimed at the operation of Abscam in general.

It is clear, however, that for a court to dismiss an indictment there must be not only a constitutional violation (72), but also some resulting adverse effect or prejudice to the defendant. US v. Morrison, __US __, 101 SCt 665 (1981). In Justice White's opinion, rare in the Supreme Court because it was unanimous, he noted

absent demonstrable prejudice, or substantial threat

> thereof, dismissal of the indictment ,for a sixth amendment right to counsel violation. is plainly inappropriate, even though the violation may have been deliberate. This has been the result reached where a Fifth Amendment violation has occured, and we have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment.
>
> 101 SCt at 669 (footnotes omitted).

In support of the reference to the fifth amendment, Justice White cited US v. Blue, 384 US 251 (1966), where the Court had commented that so drastic a step as barring prosecution altogether for having acquired incriminating evidence in violation of the fifth amendment

> might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.
>
> 384 US at 255.

Again, in US v. Payner, __US __, 100 SCt 2439 due process comes into play only when the governmental activity in question violates some protected right of the (73) particular defendant. Violation of a third party's right does not warrant court intervention on due process grounds.

The Second Circuit in US v. DeSapio, 435 F2d 272

(CA2 1970), cert. denied, 402 US 999 (1979), reached a similar conclusion when it commented:

> The difficulty courts have had in explicating and marking the boundaries of the defense of entrapment, * * * suggestes the inadvisability of attempting to develop a penumbral doctrine that would add to the many collateral issues now pervading criminal trials still another, a judicial determination whether the activities of an informer had passed some ill-defined acceptable bounds. Where, as here, there is no claim that the informer's activity infringed any specific of the Bill of Rights or any statute of the United States relating to the conduct of investigations, and the competing considerations are such that we are unable to conclude that it violates the "decencies of civilized conduct," * * * such decisions had best be left be left to the executive branch, which is accountable for its conduct to congress.
>
> 435 F2d at 281 (citations omitted).

In US v. Szycher, 585 F2d 443 (CA 10 1978), the Tenth Circuit also recognized a possible due process defense based upon outrageous conduct by law enforcement people. The informant there had used and distributed cocaine to others, had fraudulently solicitied credit, had converted and stolen property, had failed to pay his just debts, had a past criminal record, and had been paid $300 a head by the government agents for each person he could bring (74) into the drug trade. These factors, separately or together,

were insufficient to warrant dismissal of the indictment, however, because they did not infringe any right of the defendant. To present a valid defense, the court held, the misconduct "must be postured as connected in some way to the commission of the acts for which the defendant stands convicted." 585 F2d at 447.

Even with formal administrative regulations, violation does not require so mild a sanction as suppression of evidence, US v. Caceres, 440 US 741 (1979); much less could violation of regulations or guidelines require dismissal of an indictment.

Defendants point to certain "guidelines" for the conduct of undercover investigations that had been established by Attorney General Levi and that were referred to by Assistant Attorney General Heyman in his testimony before a congressional committee looking into Abscam after it went public. While many of those guidelines may have been aimed at producing "reliable" evidence, none of them alone expresses a constitutional standard.

From the justice department's point of view, an indictment should not be brought without an excellent chance for a conviction; weak cases, therefore, are to be avoided. Most of the guidelines have the dual purposes (75) of injecting basic fairness into the proceedings and of assuring a convincing case when the investigation is concluded. Failure of an investigator to follow any particular guideline or any combination of guidelines, however, does not authorize a court to invalidate a conviction. Mere weak spots in the government's case are properly the subject of evidence and argument before the jury, as they were in these cases, and they may increase the chances of acquittal But they neither guarantee nor warrant dismissal by the court.

Defendants also point to the failure by FBI agents to make the usual "302 reports" of some of the events which occurred in the course of the Abscam investigation. Amoroso made few, if any. His explanation was that he was working undercover and that the truly significant events in which he participated were fully recorded

electronically would have been useless paperwork. While 302s are desirable, perhaps indispensable for the FBI to effectively function in its overall operations, their absence does not raise constitutional issues in these cases. Lack of documentation of the government's investigation raises issues of credibility, but not of constitutionality.

(76)

5. "Red Flags".

Defendants argue that the justice department recklessly disregarded certain "red flags" which should have put them on notice that the investigators were "out of control". The focus here is upon a series of claimed instances of Weinberg's misconduct, coupled with certain warnings and questions that were raised about the investigation by Robert Del Tufo, United States Attorney for New Jersey, and two members of his staff, Robert Weir, and Edward Plaza.

First, as to the claimed misconduct by Weinberg, none of the instances, even if true, has any direct relationship to any protected right of these defendants. Except for the

three expensive watches that Weinberg promptly turned over to the FBI, there is inconclusive evidence in the record about the gifts. The court is satisfied that DiLorenzo, Errichetti's nephew, lied about the microwave oven. The other evidence of gifts is simply unpersuasive.

It is true that Weinberg encouraged Errichetti and Rosenberg to provide forged certificates of deposit, supposedly to be used by the sheik as security for release of cash from his overseas banks. This technique, however, simply furthered the overall investigation and was carried on under the supervision of and with the knowledge of the (77) FBI. By convincing Errichetti and Rosenberg that Weinberg, Amoroso and the sheik were willing to act illegaly, Weinberg carried forward the theme of the overall scam, and made his other overtures to them appear more credible. No social harm came from conduct; the phony CDs were turned over to the FBI and were never used.

Similar considerations control Weinberg's receipt from Errichetti of a letter forged over the signature of Senator Williams. Weinberg and Amoroso had told Errichetti that

the new Arab businessmen who were considering buying the titanium mine would like confirmation in writing that Senator Williams would guarantee government contracts for purchase of the titanium after the sale, just as he had agreed to do for the original investors before the sale. Errichetti volunteered to supply such a document, indicating his willingness and ability to have it forged. There was no impropriety in Amoroso and Weinberg permitting Errichetti to go ahead when the only result was to have the forged document delivered to them. Indeed, the document constitutes powerful evidence of the depths of corruption to which Errichetti, an elected public official, has sunk.

Much attention at the due process hearings was focused upon the so-called "coaching incident" involving Weinberg, Errichetti and Senator Williams on June 28, 1979. Just before Williams was to meet the sheik, Weinberg and (78) Errichetti spoke to him about the impending meeting and how they thought Williams should speak and act.

Prior recorded conversations among co-cospirators Errichetti, George Katz, Alex Feinberg and Sandy Williams had revealed that Senator Williams was close-mouthed, reluctant to push his own position, and frankly unimpressive to the likes of Errichetti. Weinberg, of course, desired to have Williams appear before the sheik (and the hidden TV camera) without inhibition or restraint so that he would clearly reveal that he would guarantee titanium contracts. In Weinberg's conversation with Williams, which Weinberg recorded, he urged Senator Williams to impress upon the sheik how important and influential the senator was, that he should "come on strong," that what he said was not important because Williams was "on stage for 20 minutes". Weinberg told Williams "You gotta just play and blow your horn. the louder you blow and mention names, who you control * * * ." Williams Ex. 14.

Defendants argue that this kind of "coaching" of subjects in advance of their appearances before the hidden cameras is grossly improper and typical of the overall

conduct of Abscam. It is neither. While not to be condoned, because it creates a serious danger of unreliability, such conduct by Weinberg could be the basis for corrective judicial (79) action only if it appeared that it actually had some effect upon Williams' own behavior. When he testified at his own trial, however, Williams stated that he paid no attention to what Weinberg had told him, and that when he appeared before the sheik he knew what he was going to say and he said it. Williams Tr. 4284-86. Moreover, Williams was not a weak, naive, inexperienced person. On the contrary his intelligence, strength and insight had carried him to the very heights of political prominence and power.

Now was the "coaching" incident typical of Abscam. Except when on camera, at the meetings, Weinberg did not speak to any other of the congressional defendants at any time, let alone at the critical point just before the meetings. Thus, none of the present defendants can claim to have been directly affected by the Williams "coaching" incident, nor was there any pattern of similar operations

that in some way might be said to have affected the rights of these defendants.[22]

Considerable evidence was presented at the due process hearing about a meeting at the home of special agent Larry Schneider in New Jersey, held on August 9, 1979. The meeting was attended by Weinberg, Good, several FBI agents from New Jersey, and Plaza and Weir from Del Tufo's office.

(80) According to Plaza and Weir, Weinberg was criticized at that meeting for having given Senator Williams instructions prior to the June 28th meeting. This testimony was corroborated to some extent by two of the New Jersey FBI agents. Weinberg's alleged response was that if he did not put words into the subjects' mouths the government would never be able to make cases.

By the time of the due process hearing Plaza and Weir, and, of course, the defendants, urged that this incident with Williams constituted serious misconduct that jeopardized the entire investigation. Plaza and Weir testified that a serious argument developed between Plaza

and Weinberg at the August 9 meeting, and that "putting words in subjects' mouths" became a major point of concern for the rest of the investigation.

There is no question but that some sparks were generated at the August 9th meeting. Plaza's abrasive manner an blunt criticism caused Weinberg to argue with him and later even to threaten to quit Abscam if Plaza and the New Jersey prosecutors were going to run it. Even before the August 9th meeting Lawrence Scharf of the Eastern District strike force had cautioned Weinberg that he should not put words into the subjects' mouths. Weinberg and Good disliked Plaza and his participation (81) in the investigation. Whatever may have been said at the August 9th meeting, over the ensuing months Plaza and Weir wrote several memoranda criticizing Abscam and its handling by Puccio's staff in the Eastern District of New York, but the "coaching" incident received only passing reference. To the extent the Plaza and Weir urge that it was a continuing and active point of dispute, therefore, they are inaccurate. By the time of the August 9th

meeting it was past history, and the technique was not thereafter repeated. The motivations for the conduct and testimony by Plaza and Weir and their superior, Robert Del Tufo, are discussed in section VIII, infra.

(82)

6. Use of Middlemen.

The congressional defendants uniformly complain of the government's use of middlemen such as Criden, Errichetti and Silvestri. They characterize them as having been "deputized" so that the government could evade its own responsibilities. Under this argument, defendants urge that after if became apparent that Weinberg could not "coach" the subjects before they appeared on camera, the government then had Weinberg "coach" Criden, Errichetti and Silvestri so that the middlemen in turn could tell the congressional subjects what they were supposed to say and do when they met with the sheik's representatives. In effect, defendants argue, the middlemen themselves were made representatives of the government, which now must answer for their misconduct.

To suggest that the government be held responsible for the criminal, corrupt, self-seeking machinations of Errichetti and Criden is ludicrous. Those men, as well as Silvestri, smelled easy money to be made by bringing in corrupt politicians who would promise the sheik special favors in return for money. The government, of course, realized how venal and corrupt Errichetti and Criden were. From the agents' point of view, the suprising thing was that any public official would do business with such people (83) and, worse yet, permit himself to be brought into strange surroundings to discuss private legislation with strangers representing foreign businessmen, and, worst of all, to accept money under those circumstances.

The government's "use" of Criden, Errichetti and Silvestri was no more improper than an undercover agent's infiltration of a drug ring in order to gain the confidence of its members and obtain evidence necessary for conviction. US v. Russell, 411 US at 432. Like drug trafficking, trafficking in corrupt political influence is extremely difficult to detect. In a bribery transaction, as with a drug

sale, both participants are satisfied with the result. There is no "victim"; each side receives what it requested. The ultimate victims of drug sales are the users who become addicted and enslaved to an extra-legal system that forces upon many of them a life of crime, misery and death. While less dramatic, the consequences of bribery are more insidious. No one suffers immediate pain, indeed, with a succesfful bribe, only the participants know it occurred. The overall consequences to society, however, are very dangerous.

As Judge Newman noted on a pretrial appeal in the Myers case,

> ,B.ribery is a secretive enterprise, not likely to be detected as long as the bribe giver and taker maintain their silence. A sting operation, ,84. it is urged, provides a needed law enforcement weapon. Finally, emphasis is placed on the high public interest in guarding against corruption in the legislative process. The known availability of a bribery sting can act as a powerful deterrent.
>
> US v. Myers, 635 F2d 933, 939 (CA2 1980).

When public officials are as readily corrupted as were the defendants in these cases, the republic is in grave danger. Far more threatening to our national survival than any

foreign enemy is corruption and rot at the center of our government. If legislative action by members of congress can be purchased with funds supplied by unseen foreigners, in jeopardy is the very core of our democratic government, faithful representation of citizens by their elected representatives.

Detection of bribery is difficult, if not impossible, unless either the one who offers or the one who receives the bribe cooperates with law enforcement. Because most bribes occur in secret, usually in a "one-to-one" situation, proof of such meetings by electronic recording is essential. In order to detect and successfully prosecute crimes of the type committed here, law enforcement officers must have considerable latitude to infiltrate the activity, to pose as persons willing to pay money for favors, to encourage others to produce corrupt politicians who will accept bribes, to present a misleading appearance by use (85) for example, of the "sheik" scenario, complete with yacht, airplane, private hotel suites and other trappings of wealth, and to secrecy record the resulting bribe transactions.

Middlemen are a necessary part of the overall investigative effort, for a corrupt politician would be most unlikely to respond directly to a stranger's bribe overtures. More likely, he would prefer to work through a "bag man" or at least through someone in whom he has confidence, generated perhaps by past personal experience in similar matters.

In these cases, the government presented no independent evidence of any prior arrangements between these middlemen and the defendant congressmen. The government did have, however, confident assurances by the middlemen that they had the contacts and that they could and would produce congressmen ready to take bribes. With these defedants, those assurances must have been based on something more than mere hope, be it actual knowledge, past experience, or whatever. But on whatever the middlemen relied, it obviously combined with ready corruptibility on the part of the defendants.

The agents had no duty to independantly verify the middlemen's claims of access to corrupt congressmen;

simply waiting to see what happened was verification sufficient to provide reliability. In some cases the middlemen's (86) claims proved unfounded; in others, however, as with these defendants, the claims sadly proved to be accurate.

Unlike the other congressional defendants, Thompson did not accept his money on the first offer. After he left the meeting, Criden argued extensively with Amoroso, claiming that there had been an earlier understanding between Criden and Weinberg that the payment could be made to Criden for later delivery to Thompson. When Amoroso made it clear that the payment would have to be made either directly to Thompson or to Criden in Thompson's presence, Criden asked for a second opportunity to bring Thompson to them. That same evening he returned with Thompson who, then, readily accepted the money.

Although Thompson tries to make much of these differences, his rights were in no way infringed by these events. Placing these recorded meetings together,

Thompson's understanding of what was happening and his willingness to accept the bribe money were crystal clear to the jury and to this court.

Citing the interim meeting on October 9, 1979 wherein Criden, Weinberg and Amoroso discussed Thompson's refusal of the money in his first appearance before the cameras, Thompson argues that the government in many ways improperly authorized Criden to misrepresent to Thompson what was going on. Such an interpretation of the interim (87) meeting is misleading. A more accurate view is that Criden was disappointed by Amoroso's failure to give up the money to Criden and Thompson, even though Thompson had not committed himself to assist the sheik on immigration.

In effect, what Amoroso and Weinberg did was to give Criden a second chance to demonstrate Thompson's corruption. Perhaps he had not sufficiently prepared Thompson for the meeting; perhaps Thompson had temporarily lost his nerve. In any event, Criden said he was confident that proper assurances could be made and

that delivery of the money could be made in Thompson's presence based on those assurances. An overall evaluation of the two Thompson meetings, linked by the interim meeting between Criden, Amoroso and Weinberg, was uniquely a problem for the jury, and raises no constitutional issue.

Moreover, in the actual context of the trial, the events of October 9th were not the conduct for which Thompson was charged or convicted. They, together with the testimony by Congressman John Murtha, merely provided background to show that Thompson had aided and abetted Murphy in Murphy's receipt of a $50,000 payoff at a subsequent meeting.

Ultimately, Thompson's arguments come down to a contention that the evidence against him lacked reliability (88) and was insufficient to prove beyond a reasonable doubt that he was aware that he was engaging in bribe activities on October 9, 1979. However, reliability is provided by the videotaped episodes, and by the testimony of Congressman Murtha. What interpretation should be

placed upon that testimony and upon what was said and done in front of the video cameras was a function for the jury. There was no way for the government to prove what Criden said to Thompson over the telephone or in Thompson's office. Thompson, himself, testified to those conversations, but evidently the jury did not believe him. If these events failed to measure up to the justice department's recommended guidelines, that might help the justice department determine whether or not a strong case was "made," but it does not render Thompson's conviction unconstitutional.

7. Book-writing.

Defendants contend that their constitutional rights have been violated because of alleged book-writing activities by Weinberg, Puccio and a retired FBI agent, Neil Welsh. Agent Welsh had little contact with Abscam while it was going on, has not yet written a book, is not shown to be about to, and in any event, is a retired agent over whom the government has no control and for whom it has no responsibility.

(89) Weinberg, himself, has not written a book, but did cooperate with one Robert Greene, who published a book in April 1981 about Weinberg and Abscam.[23] Since Weinberg is not a federal employee, his conduct cannot be controlled directly. It may be, as defendants contend, that Weinbeg surrpetitiously obtained from FBI or anyone from the Department of Justice assisted him in that activity. Most important, defendants have failed to show what Weinberg's cooperation with Greene in any way were tried and convicted before the book was published. In fact, the Green book project may have actually assisted defendants, for they used information in Greene's outline for the book as a basis for cross-examining Weinberg at trial and information taken directly from the book in an attempt to bolster their arguments on these motions.

The problems presented by allegations that Puccio agreed to author or co-author a book are different. Puccio was head of the Eastern District Strike Force all during Abscam, and he was the highest "line" agent of the justice department with direct, daily supervision of

Abscam. He also prosecuted all three of the cases now under consideration as well as Senator Harrison Williams and Alexander (90) Feinberg. Clearly and uniquely, he controlled and directed Abscam.

Defendants contend that Puccio agreed with Jack Newfield, an editor of The Village Voice, to write a book about Abscam. If true, such an agreement would be grossly improper, if not a criminal violation under at least the conflict of interest prohibition of 18 USC Sec. 203. Upon closer examination, however, defendants' allegations have proved to be mere wishful thinking.

Newfield and Puccio have known each other since 1976 and became close personal friends in 1978 when both became factors. They and their families have vacationed together; they meet frequently on a social basis. In the summer of 1979, Newfield, who has written a number of books on social topics, inquired of Puccio whether he would be interested in collaborating on a book about federal law enforcement based primarily upon Puccio's experience in the Strike Force. Puccio's response was that

he might be interested someday, but could not consider it as long as he remained employed by the government. Newfield persuaded Puccio to meet once with Newfield's literary agent, who, after discussing the book possibility with them, concluded that such a book would have only limited sales appeal. Nothing further was done such a book. At that time, (91) neither Newfield nor the literary agent knew anything about Abscam.

Newfield first learned of Abscam when it went public on February 2, 1980. Shortly after that, Newfield's agent, recognizing the sales potential of an insider's story on Abscam, asked Newfield if Puccio would collaborate on a book covering the investigation. Doubting that he would do so, Newfield nevertheless asked Puccio about it and received the expected reply, that Puccio could not even discuss the matter until the cases were closed and Puccio had left the department. Despite Puccio's unwillingness, Newfield himself signed a contract with a publisher to write a book on Abscam, and the contract made a provision for the possibility of an unnamed collaborator who would receive a substantial cash advance. Puccio did not know

about the collaboration clause until January, 1981. Both Puccio and Newfield testified that there was no formal or informal agreement or understanding between them with respect to the collaboration clause, and the court believes them.

Obviously, Newfield and his publisher would like to have Puccio as a collaborator on a book about Abscam, as no doubt would many other authors and publishers. It is equally obvious to this court, after hearing both Newfield's and Puccio's testimony on the subject, that Puccio (92) never agreed to write such a book, and he has never considered doing so as long as he remains an employee of the justice department. At all times Puccio has acted with complete integrity and propriety with respect to Newfield overtures to him about such a book. Nothing in these circumstances in any way taints the integrity of Abscam, its resulting prosecutions, or Puccio's handling of them.

8. The "Asylum Scenario".

There was some conflict in testimony in the various trials as to precisely how, when, where, and by whom the so-called "asylum scenario" was created. It may have been suggested by Weinberg in the spring of 1979. It may simply have occurred to Amoroso when he read of General Somoza's problems in remaining in this country, problems that were extensively covered by the news media just one day before Criden and Errichetti arrived on the yacht in Florida to dicuss casino financing. While the differences in testimony might be proper considerations for the jury in determining the credibility of Weinberg and Amoroso, the ultimate facts surrounding origination of the asylum scenario are immaterial to this case. Whether it came from Weinberg, or Amoroso, or someone else, makes no difference to any issue before the court, nor to any issue before the jury except credibility. The undisputed facts are that it was discussed on the yacht with Errichetti, who, on the place ride back (93) to Philadelphia discussed it with Criden, and that shortly thereafter Criden and Errichetti

together began producing politicians who accepted the bribes offered to them.

C. Weinberg and His Conduct.

Defendants focus a number of attacks on Melvin Weinberg, whose peculiar talents undoubtedly contributed much to the success of Abscam. Some of these arguments are dealt with in earlier sections of this decision, e.g., VI-A-3, VI-B-1, VI-B-2, VI-B-5, VI-B-6 and VI-B-7, supra. This part of the decision considers some of the remaining arguments against the government's use of Weinberg in this investigation.

1. Weinberg's Criminal Background.

Defendants argue that the government knew that Weinberg was untrustworthy and that defendant's due process rights were violated when the government permitted such a person to play a major role in Abscam. For Abscam to have been successful, however, the investigation required a man of Weinberg's unusual

persuasive talents. He was an experienced con man, who in the past had successfully played the role of front man for wealthy Arabs, and who had numerous contacts of the gray world of those who associate with organized crime figures, influence peddlers, crooked businessmen and corrupt politicians. Clearly, Weinberg (94) does not have the "pure background one might reasonably expect in an FBI agent. But it was precisely because of his unsavory background, his ability to lie convincingly, his understanding of the corrupt mind and his ability to imagine and execute a grand charade on the scale of Abscam that Weinberg was enlisted for the investigation. Further, Weinberg gave considerable credibility to the entire undercover operation; persons dealing with Weinberg in the context of Abscam could check him out with other sources and be wrongly assured that they were not dealing with government agents. Weinberg had a track record that no legitimate government agent could provide or falsify.

Moreover, the governement was not required to find Weinberg "reliable," as would be the case if he were an

informant whose information was used to obtain a search warrant. As indicated elsewhere in this decision, section V-A-6, supra, the basic reliablity for the investigation, and ultimately for the prosecutions, was guaranteed by having the crimes committed on camera under the circumstances guided by Agent Amoroso and closely supervised by Agent Good.

Defendant Murphy would analogize Weinberg's prior "front fee scam technique" to his claimed solicitations of gifts and loans from subjects of the investigation. But even assuming that Weinberg in Abscam solicitied gifts and (95) loans, they were incidental to the scam and not the heart of the transaction. The focal point of the criminal transaction here was the substantial financial benefit of $50,000 delivered to the congressmen. While anything of value Weinberg received from defendants beyond the knowledge of the FBI may subject Weinberg to difficulties in his relationship with the FBI, that fact would not in any way alter or detract from the acts of the defendants. Throughout these trials, defense counsel sought to make

Weinberg's character and activities the key issue before the juries, thus distracting from the conduct and motivations of the defendants. These issues were unsuccessful "red herrings" at the trials, and they are "red herrings" still.

The court finds no constitutional infirmity in the government's use of a person of Weinberg's background as a central figure in this undercover operation.

2. Weinberg's Finances.

Defendants also urge that their due process rights have been infringed because of (a) the amount of money paid to Weinberg during the investigation and prosecutions, (b) a possible promise to Weinberg of a bonus at the end, and (c) the government's failure to require Weinberg to pay income taxes. (96)

There is no question but that Weinberg has been substantially compensated for his Abscam services. The total payments to him at the time of the Willaims trial amounted to approximately $150,000. From approximately April 1979 to April 1981 he was paid by the FBI at the rate

of $3,000 per month, plus expenses, plus certain bonuses in recognition of work perceived by the Bureau to be exceptional. In addition, Weinberg testified that he expected to receive a substantial additional payment when Abscam is concluded. He hopes it will be on the order ot $100,000. Both Weinberg and the FBI agents deny that any bonus has been guaranteed to him or that any additional payments are conditional upon the ultimate success of the prosecutions.

Here the court finds that Weinberg's payments in Abscam have not been contingent. Even if they were, however, that would be but one more fact to be weighed in determining the reliability of the results obtained. Payments to informants contingent upon successful prosecution of those with whom they deal have been judicially criticized, but such payments do not require dismissal of an indictment. See, e.g., US v Brown, 602 F2d 1073 (CA2 1979); US v. Szycher, 585 F2d 443 (Ca 10 1978).

(97)By cooperating with the government in establishing

and operating Abscam, Weinberg has essentially devoted nearly three years of his life to this investigation. His personal safety is in serious jeopardy, and there is little he can do in the future by way of either legitimate or illegitimate activity. His "career" as a con man has ended because he is so well known. Legitimate businessmen undoubtedly would shun him, because of his confessed criminal history and obvious talent for subterfuge, trickery and lying.

Whether his contribution to law enforcement in these cases and the personal sacrifices he has endured, during both the investigation and the prosecutions, are worth the amount of money the government has conferred upon him, is perhaps a matter for serious consideration by the justice department and even by congress. It is not, however, a matter upon which this court will pass judgement for purposes of determining whether the fruits of his activities on behalf of the government should be dismissed. How much money is paid to a government informant and not one for judicial review at the behest of a defendant who

was caught by the informant's activities.

(98) The issues are similar with respect to Weinberg's income tax liabilities. All citizens, of course, must meet their obligations under the internal revenue laws. When a citizen fails to do so, he or she may be subject to administrative or judicial penalties for failure to meet those obligatiosn. As with the previously discussed possibility that Weinberg extracted gifts from defendants without knowledge of the FBI, Weinberg's failure to pay taxes may subject him to difficulties in his relationship with the IRS or the FBI. What is clear, however, is that these defendants have suffered no infringement of their rights because the government, for whatever reason, has not yet prosecuted Weinberg for possible income tax violations.

D. Miscellaneous Claims.

1. FBI Interview of Lederer.

Defendant Lederer claims he was trapped into giving a false statement to an FBI agent who interviewed him on

February 2, 1980. He claims that the agent knew the true facts, but asked questions of Lederer which permitted him to give false answers. According to Lederer, this was an effort to "test his morality" and his failure of the test had the effect of prohibiting him from testifying at trial. In effect, Lederer argues that the government (99) has no right to ask him any question to which it already knows the true answer.

Merely to state the argument is to refute it. If such questioning by an agent violated a defendant's due process rights, much legitimate governmental investigation would by stymied. Defendants do not need such unprecedented protection, since truth is a solid protection for the innocent. When a person is questioned by an FBI agent, he or she may answer truthfully, without fear, if no crime has been committed. If a person has such fear, protection is limited to the silence guaranteed by the fifth amendment's privilege against self-incrimination. No defendant has a constitutional right to lie to the investigating agent, and then have a successful prosecution set aside because the

agent knew at the time of the interview that the defendant's statements were lies.

2. Instructing Agents about Testimony.

Defendant Lederer claims that the government instructed its agents to "pepper" their testimony throughout the trial and due process hearings with the answers, "I don't know" and "I don't recall". To begin with, there is no evidence whatsoever that any of the agents or Weinberg was given such instructions. Of course, many of the questions did produce such responses. In this court's view, (100) however, when the agents testified that they did not recall an incident, their lack of recollection did not appear to be unreasonable or deliberate.

The questioning of the agents was intensive, focusing frequently on many irrelevant details, and covering many circumstances that an agent might reasonable forget. The investigation had covered many months and included hundreds of meetings and conversations with a large

number of people. It used electronically recorded conversations as the primary means for record-keeping, thereby greatly relieving agents of the need for careful recall of many events. Moreover, particularly with Weinberg and Amoroso, the undercover operatives were dealing with a number of many events. Moreover, particularly with Weinberg and Amoroso, the undercover operatives were dealing with a number of fictitious stories that varied from subject to subject. Keeping them straight at the time must have been severely taxing. To fully recall them all several months later, in proper sequence and with the minute detail demanded by defense counsel, would have been impossible. The court detected no signs of evasiveness on the part of the agents or Weinberg. When they answered "I don't know" or "I don't recall" the court was satisfied that they were truly reflecting their actual recollections at the time.

(101)

3. Entrapment of Lederer.

Defendant Lederer, the only one to request an entrapment charge to the jury, argues entrapment as a matter of law. To the extent that his argument focuses upon "objective entrapment," it has been covered above in section VI-A-1, supra. However, since entrapment was also a jury issue for Lederer, his argument of "entrapment as a matter of law" can also be viewed as an assertion that on the evidence before the jury no reasonable juror could find beyond a reasonable doubt the Lederer was predisposed to commit the crime.

Lederer argues that the government's proper role was limited to detection of persons who were already involved in criminiality, that Lederer's crime and the intent to commit it originated with the government agents, not defendant Lederer, and that "absent the temptation offered by government agents, Lederer might not have commited the crime." Lederer's memorandum at 7. the essence of this claim is that the government's evidence, which established no more than criminal conduct on this

one occasion, was legally insufficient to meet the government's burden of proving that Lederer was "predisposed."

The flaw in Lederer's argument, however, is demonstrated by the careful exposition by Judge Learned Hand (102) of the three means available to the government to show predisposition of a defendant where that defendant claims that governmental officials had designed and provoked the particular crime:

> an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance.
>
> US v. Becker, 62 F2d 1007, 1008 (CA2 1933) (emphasis supplied).

It is unfair to permit a jury to infer a defendant's mental state, his predisposition, from the manner in which he responds to a bribe offer. With Lederer, who confirmed on videotape that he was "no Boy Scout," his willingness, eagerness and predisposition were easily and reasonably inferred from the videotape of the bribe transaction,

evidence that was more than sufficient to support the jury's verdict. Under such circimstances, Lederer's claim of entrapment as a matter of law must fail.

4. Publicity Leaks.

In pretrial motions all defendants argued that the indictments should be dismissed because of prejudicial publicity given to Abscam before return of the indictments. There can be no doubt but the leaks from the Department of Justice did occur. Judge Mishler denied (103) defendants' pretrial motions to dismiss on this basis, finding that defendants "failed to demonstrate that they suffered actual prejudice by reason of the pre-indictment publicity." Memorandum and order of August 6, 1980 at 15. Judge Mishler also found that dismissal of the indictment would be an unwarranted exercise of the court's supervisory powers.

These leaks caused serious embarassment to the government and such concern to the justice department that it designated Richard Blumenthal, United States

Attorney for the District of Connecticut, to investigate and report. At least part of his findings have been made public, and appropriate internal discipline have been made public, and appropriate internal discipline has been administered to the offenders by the justice department.

This court need be concerned with the causes of the leaks only if some right of a defendant was infringed. There is no indication here that either fair treatment before the grand jury or a fundamentally fair trial was in any was compromised by the barrage of publicity that accompanied public revelations of defendants' activities and the Abscam investigation. Before the grand jury, the cases of all of these defendants were extremely simple, consisting primarily of the videotapes. There is no indication that any of the grand jurors was influened in favor of returning indictments by earlier publicity, and Judge Mishler disposed of this aspect of defendants' claims in his memorandum and order. Of course, the indictments (104) returned have ultimately proved to be well-founded, because in each case extensive trials, vigorously and

meticulously defended by able counsel, have established not only probable cause for prosecution, but guilt beyond a reasonable doubt.

As to the trials themselves, the court is satisfied that each juror selected was free of any prejudice or bias that may have resulted from the leaks of information out of the justice department, other pretrial publicity, or the information made public in preceding trials. Careful questioning of each potential juror eliminated those who showed prejudice from prior publicity and succeeded in selecting for each trial fair-minded jurors who were able to view the evidence impartially and reach a fair determination.[24]

(105) VII. JUDGE FULLAM'S DECISION IN US v. JANNOTTI AND SCHWARTZ

Since Judge Fullam in Pennsylvania has dismissed the indictements against Philadelphia councilmen Jannotti and Schwartz on post-conviction motions similar to those now before this court, some discussion of his decision is

appropriate. US v. Jannotti, 501 F Supp 1182 (Ed Pa 1980) (appeal pending). Familiarity with Judge Fullam's opinion is assumed.

In reaching his conclusion, Judge Fullam was obviously influenced strongly by the tenuous connection between the Philadelphia trial events and federal jurisdiction, and he expressly disapproved "artificial federalization of purely state crimes." 501 F Supp at 1204.[25] The Philadelphia "bribes" involved local officials and their relationship to local zoning matters in the city of Philadelphia. Schwartz and Jannotti made no committment that they would be influenced in their decisions. Indeed, they were so anxious to have the sheik construct his hotel complex in the city that the mere offer to make such an investment would have guaranteed any reasonable variances required. Defendants had not requested the bribe payments and they made it clear that such payments were unneccesary. Under these circumstances, Judge Fullam found that the Hobbs Act, 18 USC Sec. 1951(a), which provided one of the pegs for (106) federal jurisdiction, did not apply because there was no

extortion within the meaning of the statute. Moreover, according to Judge Fullam, the Hobbs Act does not operate "to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur." 501 F Supp at 1185.

With Abscam cases now before this court, the Hobbs Act is not in issue. Instead, the congressmen were charged with and convicted of violating other federal statutes such as bribery, conflict of interest, and criminal gratuity. Such direct violations of federal law by federal officials establish unquestioned federal jurisdiction.

Judge Fullam did find a basis for federal jurisdiction under the alleged RICO violations, 18 USC Sec. 1962(c), premised upon the activities of Criden's law firm as the "enterprise". Since Judge Fullam found the RICO convictions to be supported by sufficient evidence, he found it necessary to consider the entrapment and due process issues, both of which he resolved against the government.

Many of the factors that were central to Judge Fullam's due process decision in Philadelphia, however, are

either different or absent fromthe New York cases. With Jannotti and Schwartz, for example, the undercover agents indicated that the sheik would not consider investing (107) in the city unless the councilmen accepted the money that was offered. No parallel threats were made with the congressmen. On the contrary, with each of them, money was clearly offered in relation to official conduct in immigration matter. If the official agreed to be "influenced" in that matter, it was bribery under federal law, if the payment was received merely in relation to the matter, it was a criminal gratuity or conflict of interest, or both.

Further, the extensive emphasis in Philadelphia on the "Arab mind," 501 F Supp at 1194, was not nearly as significant in the dealings with the congressmen. Only in the January 25, 1980 meeting with Myers was there any significant reference to the "Arab way" or the "Arab mind," and this was months after Myers had taken his bribe.

Moreover, unlike the case involving the Philadelphia

councilmen, the Congressmen here were presented with a clear request that their official conduct be influenced in a manner that would otherwise not occur.

Judge Fullam found the inducement to the councilmen to be so attractive that the government could not use their acceptance of the money as evidence of predisposition. The large sums, the fact that the councilmen were not asked to act improperly but only to do what they would have done anyway, and the threat that if they did not take the money (108) there would be no project, all combined in Judge Fullam's view to preclude the mere acceptance of the money as sufficient evidence of predisposition. With each of the congressmen charged in these indictments the circumstances were far different. While the amounts offered were comparatively large, they were to be shared in substantial part by the co-conspirators. In each case the congressmen was asked to act improperly and in clear violation of federal law, and in no instance was there any indication that other conduct by the sheik would have been influenced by whether or not the money for immigration

legislation was accepted or refused. On the contrary, the congressmen wanted the sheik to invest in their districts so as to provide a "cover" for support of his immigration to this country.

Since he was sitting in the Third Circuit, Judge Fullam was, of course, governed on the due process issue by US v. Twigg, 599 F2d 373 (CA3 1978), one of the few of the government's excessive creative involvement in a crime. Although he recognized that "governmetal subterfuge and even creative involvement may be necessary to combat" municipal bribery, Judge Fullam concluded that the techniques employed with the Philadelphia councilmen, Schwart and Jannotti, "went far beyond the necessities of legitimate law enforcement" and, under Twigg, order that judgements (109) of acquittal be entered on their behalf. 501 F Supp at 1204.

Although Judge Fullam accepted the propriety of undercover agents using a business entity, real or imaginary, as an attractive target for corrupt overtures by city officials even with hints that such overtures would be

welcome, he concluded that "it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty." 501 F Supp at 1204. He also thought it permissible for undercover agents to initiate bribe proposals "at least in connection with suspected ongoing corrupt activities on the part of the targeted officials." Id.

As previously indicated, this court is not directly controlled by Twigg. to the extent that Judge Fullam found due process violations in the undercover agents offering bribe proposals in the absence of "suspected ongoing corrupt activites on the part of the targeted officials" this court respectfully disagrees. US v. Ordner, supra, 554 F2d 24 (CA2 1977).

If the "appeal to civic duty" directed at Schwart and Jannotti was essential to Judge Fullam's conclusion, (110) then his decision is clearly distinguishable on the facts. Here, potential investments in the defendat congressmen's districts were essentially discussed as a means of

protecting the congressmer and providing them an explanation for their proposed introduction of private legislation. Investments here were an inducement to accept a bribe primarily in the sense that a congressman's introduction of a private immigration bill for the sheik in return for bribe money could be justified to others by the sheik's financial participation in the congressmen's district. the appeal here was not to defendant's civic duty, but to their greed, backed by an assurance that the sheik would do what he could to protect the congressmen from exposure.

If Judge Fullam's opinion should properly be read to be grounded on outrageous governmental conduct because the undercover agents initiated bribe offers and provided extremely generous financial inducement, then this court again disagrees. The government needs such techniques in its effort to resist corruption on the federal level, especially where, as here, the issues are uncomplicated by the artifical jurisdiction problems that beset Judge Fullam's case. This need, coupled with the extremely difficult task of uncovering bribery, removes from the

category of "outrageous" governmental conduct the activities of the undercover agents in the present cases.

(111) Judge Fullam's premise that providing "extremely generous financial inducements" offends due process is, respectfully, unsound. The subjective entrapment approach, the only entrapment approach acceptable to the Supreme Court, see section V-A, focuses upon the predisposition of a particular defendant, so what constitutes a "generous financial inducement" necessarily varies with the circumstances of each person being induced. If the courts were to establish a threshold amount beyond which no public offical could be convicted of bribery, the rich and the powerful, those most likely to be in a position to demand large bribes, would automatically have the benefit of this defense and the crime of bribery as we know it would become the poor public offical's burden. There can be no per se amount at which a bribe offer becomes so generous as to constitute entrapment as a matter of law. Under the subjective entrapment approach, of course, the jury may consider all

these factors on the question of predisposition, but a per se rule with respect to the size of monetary inducement is illogical, unworkable, and unfair.

Judge Fullam recognized that in evaluating "outrageous" conduct a court must consider the naure of the crime involved and the tools available to combat it. See Twigg, 588 F2d at 378 n.6. The restrictions he would place on governmental investigations of bribes, however, reflect (112) a different evaluation than that of this court as outlined in section VI-A-6 of this decision. In this court's view, investigation into corrupt public officials warrants at least as strenuous and imaginative undercover efforts as do investigations into drug traffickers. The harm, tangible and intangible, inflicted on this country by corrupt public officials demands judicial support for law enforcement techniques that deter corrupt through fear of vigorous prosecution.

In sum, the Jannotti and Schwartz case in the Eastern District of Philadelphia presented serious problems of federal jurisdiction not present with the congressional

District of New York; the circumstances under which the money was paid to the Philadelphia councilmen were far different from the cash transfers to the congressmen here; and the authority of the Third Circuit's decision in Twigg, while binding in Philadelphia, lacks any parallel in this circuit. finally, this court cannot accept the suggestions by Judge Fullam that large bribes offend due process while small ones do not, and that bribery and public corruption may not be enthusiastically attacked by undercover techniques such as used by law enforcement officers in other contexts.

(113) VIII. DEL TUFO, PLAZA AND WEIR

In its early days, Abscam was drawn away from its investigations into stolen art and certificates of deposit toward the gambling casinos of Atlantic City, and finally, due primarily to Errichetti's activities, to the corrupt officials in New Jersey and Philadelphia.

Robert Del Tufo was United States Attorney for New Jersey. Two of his assistants, Edward Plaza and Robert

Weir, were assigned to work with Abscam once its intensifying focus on New Jersey became apparent. Abscam, however, was the creature of the Hauppauge, Long Island office of the FBI and was being run aggressively, but carefully, by Puccio and his Eastern District Strike Force. Weir and Plaza at least, and perhaps Del Tufo as well, were jealous of the obvious importance and success of the investigation. They were also embarrassed because an investigation which began outside of their district had uncovered a cesspool of corruption swirling around Angelo Errichetti who was mayor of one of the largest cities in southern new Jersey, as well as a member of the New Jersey state senate, and who openly claimed access to the strings of power in the White House, in the New Jersey state house, in New Jersey's casino control commission, in labor unions, and in organized crime. For such a man to be unmasked by an (114) out-of-district-prosecutor was a severe "slap in the face" to those in New Jersey charged with investigating and prosecuting violations of law.

Once it became apparent that the New Jersey U.S. Attorney's office would play a minor role in these major investigations, Plaza and Weir took a negative new of everything about Abscam. They acted as if they had convinced themselves that the highest duties of a prosecutor were to manufacture arguments for defendants, to follow an ultra-cautious approach, and to be skeptical of all new investigative techniques. Throughout their Abscam participation they urged the justice department to move more cautiously and slowly. Indeed, they did not want to move at all until every possible flaw in the investigation could be meticulously checked.

Of course, the government must not infringe the constitutional rights of any of its citizens, and New Jersey's abstract, cautious approach to law enforcement activities has great appeal in some circles of government, of law, and of academia. But such hesitation and caution is unrealistic in the practical hurly-burly of a fast-moving investigation that would not wait for lengthy reflection, but instead demanded immediate decisions, aggressive attention, and

imaginative, courageous responses to rapid developments.

(115)Under our adversary system constitutional questions can ultimately be tested in the quiet reflection of a courtroom under established procedures and the rigors of cross-examination. While a prosecutor must always be alert to and protective of defendant's rights, his or her primary function is to investigate and bring to trial those whose conduct transgresses the law. If all federal prosecutors were as hesitant to proceed in the uncharted Abscam waters as was the New Jersey office, federal law enforcement in this country would be about as effective as was New Jersey's with the New Jersey Abscam people -- i.e., there would be few, if any, indictments.

There is no perfect case. Claimed due process violations have rarely required dismissal either of indictments or of convictions that were obtained on sound and convincing evidence. The usual consequence due process violation has been an adjustment in what evidence can be presented at trial, reflected in the redaction of documents or testimony, or sometimes in the total

suppression of illegally acquired evidence.

Plaza's attitue toward Abscam was perhaps best expressed when just before Abscam went public he told a member of the Eastern District Strike Force, "I hope the whole thing blows up in your face". D.P. Tr at 2892-93. (116) Plaza did not cooperate; in fact, he resisted, and at the end almost obstructed the investigation. He may well have believed that he was sincere in his concern for defendants' rights. Had the opportunity to prosecute been his, however, one wonders if he, too, might not have put more faith in the adversary system and left it to defense counsel to raise some of the due process questions that he and Weir so diligently pursued in an apparent attempt to divert Abscam's momentum from Senator Williams.

When Plaza appeared in court on the due process hearing, he turned over to defense counsel a complete file of confidential government memoranda that he had collected from the New Jersey office, and he did this even though he had been specifically instructed by a superior in the justice department not to do so absent a specific

direction by the court. At the time, he gave no warning to the court of the confidential nature of the documents he was producing. It was only through prompt and candid warning from one of defense counsel that the court was alerted to the implications of the Plaza's precipitous action.

Plaza and Weir also took it upon themselves to complain to their superiors in Washington, with copies to all of the judges assigned to the various Abscam cases, that the government prosecutors were willfully withholding Brady material from defense counsel. Although all of (117) the information referred to necessarily required careful examination through the due process hearing, none of it revealed any violations by the Eastern District of New York prosecutor under either Brady or the Jencks Act. 18 USC sec. 3500.

(118)IX. MOTIONS FOR JUDGEMENTS OF ACQUITTAL AND NEW TRIALS

All defendants have moved on multiple grounds for judgement of acquittal or alternatively for new trials.

Additional briefs on these motions were submittd by the Myers defendants and by Murphy and by Thompson. Lederer has relied upon material included in his principal brief on the "due process" issues.

A. The Myers Motions.

In support of their motions, the Myers defendants urge all of the grounds that they advanced in connection with the due process issues and in addition, argue (1) that the court erred on various instructions to the jury, particularly with respect to the credibility of witnesses; (2) that defendant Errichetti's trial should have been severed from that of the other defendants; (3) that the evidence was insufficient with respect to Criden and Johanson; (4) that the prosecutor's summation was improper; (5) that the court's jury selection procedure was improper; (6) that venue of the case in Brooklyn had been improperly "manufactured" by the government; (7) that there were certain violations of Brady v. Maryland, 373 US 83 (1963), particularly with respect to the government's failure to

disclose information bearing upon the credibility of Weinberg as a witness; and (8) that there was error in permitting the (119) jury to see the videotape of Myers in January, 1980 as evidence of his state of minde in August, 1979.

The court has carefully considered all of the arguments advanced by the Myers defendants and concludes that none of them alone, nor all of them together, constitute sufficient basis for either a judgement of acquittal or a new trial with respect to any of the four defendants. A few comments about some of these contentions are appropriate.

The complaints about the prosecutor's closing argument ring hollow in the context of this case. Given Myers' suprising defense, that he was "play acting," the defense dramatically placed into contrast Myers' demeanor in his appearances with the undercover agents before the TV cameras and his appearance on the witness stand before the jury. Under these circumstances the prosecutor's comments about "incredible" and "Alice in Wonderland"

constituted no more than fair comment and argument about the evidence. The prosecutor's argument was fair, even restrained when contrasted with the summations of the defense counsel. Nothing in the prosecutor's summation could fairly be interpreted to have implied that he had additional information about the case beyond what was presented in the courtroom. Indeed, his plea to the jury was to decide the case precisely (120) on the basis of comparing what they had seen on the videotape with what they had seen of Myers on the witness stand.

This court did not see a need for individual voir dire of the jurors in the Myers case, although it did appear to be called for in the Thompson and Lederer trials. When the Myers defendants came to trial in August, 1980, much of the publicity about Abscam that had occurred in February and March had been forgotten. In the initial inquiry to the full panel of jurors, substantially less than 50% of the jurors could even recall Abscam or anything about it. By way of contrast, after the heavy publicity given to the Myers trial, a much larger proportion of the jurors

recognized the name "Abscam" and had some familiarity with it by the time of the Thompson and Lederer trials. Even in those later cases, however, the questioning of the jurors themselves revealed, at most, only passing recognition of Abscam. The multiple vior dire technique used with Myers has not been shown, nor even claimed to have caused, any prejudice to any of the Myers defendants, all of whom were virtually unknown in the New York-Long Island area prior to February, 1980.

The Myers defendants urge Brady violations from the government's failure to supply them with a variety of bits of information claimed to bear on Weinberg's credibility. While it is true that there were some events about (121) Weinberg's past conduct and his activities during the Abscam investigation that might be viewed as bearing upon his credibility, defendants have not shown that Weinberg's credibility as a witness at trial had any significant bearing on the case.

Counsel for the Myers defendants, and those in the Thompson and Lederer trials as well, tried to focus upon

Weinberg as the "villain in the piece," following the well-known defense tactic of attempting to get the jury to "try" anyone in the courtroom except the defendant himself. When viewed objectively, however, Weinberg's testimoney was used by the government only as a framework for background information and upon which to hand the audiotaped recordings that were admitted in evidence. There was no significant issue at trial over the general background and outline of the Abscam investigation, and while there was an attempt to challenge the authenticity of one or two of the recorded telephone conversations, those conversations by themselves played no significant role in the focal point of the trial: the scene on the videotape when Myers took the $50,000.

Moreover, even if there were some significance to Weinberg's credibility at the trial, there was so much material not only available to defendants, but also used by them, to challenge his credibility that the additional items which might have been brought out would at best have (122) cumulative. Weinberg admitted that he had been a

criminal most of his life, that he made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials. If Weinberg's credibility had been a significant part of the case, undoubtely all defendants would have been acquitted. As the trials developed, however, the government offered Weinberg's testimony only to lay a foundation for the introduction of audiotape recordings. Since the basic pattern of events was not in dispute, even the audiotapes only provided a background for the important evidence in the case: the videotapes with respect to Myers and Errichetti, and the testimony of Ellis Cook and other non-government witnesses to tie in Criden and Johanson.

The Myers motions are therefore denied.

B. Murphy's Motions.

Defendant Murphy also incorporates all of his arguments in the due process memoranda as well as all of the arguments advanced by defendant Thompson. In addition, defendant Murphy argues (1) that on this record as (123) a matter of law he cannot be found guilty of both receiving a criminal gratuity and conflict of interest; (2) that he cannot be found guilty on the conflict of interest count because Thompson was acquitted on that count; (3) that the court's supplemental instruction on receipt of the money was erroneous; (4) that the court's treatment of co-conspirator hearsay statements under US v. Geaney, 417 F2d 1116 (CA2 1969), was improper because it was more harsh on defendants than in the Myers case; (5) that the government suppressed certain evidence concerning Criden's possession of a briefcase on January 8, 1980; (6) that there were Brady violations with respect to Weinberg's testimony at the Myers trial and other incidents relating to Myers; (7) that there were Brady violations concerning congressman Murtha's testimony about whether or not he

expected to be prosecuted; and (8) that the government improperly concealed information about codefendant Criden's "plea deal".

The court has carefully reviewed all of the arguments advanced by defendant Murphy and concludes that no one of them taken alone, nor all of them taken together, warrant either a new trial or a judgement of acquittal.

Only a few comments about Murphy's arguments are necessary. The legal theories surrounding conflict of interest and receipt of a criminal gratuity were explored at length at the trial on the record. Simply put, they (124) are separate crimes for which Congress has established separate penalties. Defendant's argument that he cannot lawfully be convicted for both an unlawful gratuity and conflict of interest is unsupported by either legislative history or case law.

Murphy's contention that the jury's verdicts on the conflict of interest count are consistent because Thompson was acquitted while Murphy was convicted, is equally unconvincing. The jury was instructed to consider

separately the evidence relating to each defendant on each count. The fact that the jury returned a mixed verdict merely indicates that they endeavoured to follow the court's instructions. Moreover, even if the verdicts are viewed as inconsistent, that would not be a basis for setting aside the conviction. Standefer v. US, 100 SCt 1999 (1980).

With respect to the court's stiffening of its position with resepct to co-conspirator hearsay statements, even defendant Murphy does not claim that the charge given to the jury was erroneous. Instead, he claims that his trial tactics would have been different had the court alerted him at the beginning of the trial that the problems would be handled differently from what had happened at the Myers trial the claim of actual reliance is as unconvincing as is the claim of a right to rely on discussion about (125) the charge that took place at the beginning and during the trial.

Murphy's discussion of the 302 that placed the Murphy payoff briefcase in Criden's hands on January 8, 1980, greatly overstresses the signifigance of the briefcase itself

in the Murphy payoff that ocurred on October 20, 1979. the jury's attention was directed to the $50,000 contained in the briefcase. It was clear that Criden left the room with the briefcase in his hands. It is equally clear that all participants' interest was in the $50,000, not in who ended up with the briefcase after the money had been removed.

With respect to Congressman Murtha the newspaper report referred to by Murphy, and Nathan's subsequent testimony indicate only a unilateral decision by the justice department; they do not indicate any communication of that decision to Murtha, and the only relevant issue was Murtha's knowledge and understanding as to whether or not he would be prosecuted. He testified that he had made no deal with the government and did not know whether or not he would be prosecuted; there is nothing to indicate that he had any different knowledge.

With respect to Criden's "plea deal," the "deal" has nothing to do with a "plea". As the record clearly shows, the agreement was simply that if Criden's conviction in the

conviction in the Myers case was affirmed, the government would dismiss the indictment against him in the Thompson case. No guilty plea was contemplated. The understanding was arrived at only as a matter or timing of the trial, should one become only as a matter of timing of the trial, should one become necessary. Defendant Murphy could not have been adversely affected by that agreement, whether it was reached before or after conclusion of the Thompson trial.

With respect to the court's supplemental instruction in response to two notes from the jury, the matters were extensively discussed on the record before the instructions were given. Thompson Tr. 3235-3283. There the court's analysis is set forth; nothing in defendants' present arguments change that view.

Murphy's motions are therefore denied.

C. Thompson's Motions.

Thompson, too, incorporates all of his due process arguments as a basis for judgement of acquittal or a new

trial. In addition, he advances arguments under Brady v. Maryland, 373 US 83 (1973), focused upon Weinberg's credibility. He also challenges the sufficiency of the indictment and the proof that together focus upon the concept of Thompson's receiving money in return for Murphy's being (127) influenced. He makes a further argument with respect to claimed inconsistent verdicts.

The court has carefully reviewed all of these contentions and finds them an inadequate basis for the relief sought, either taken separately or together. The insignificance of Weinberg's credibility was discussed above in connection with the Myers claims. the sufficiency of the indictment was reviewed in a pretrial motion and the court's reasoning in that discussion remains unchanged by the trial events.

the claim of inconsistent verdicts fails for two reasons. One, inconsistent verdicts in a criminal case do not require reversal. Standefer v. US, 100 SCt 1999 (1980).

Two, the verdicts are not inconsistent, but easily reconciled on this record in light of the relative

participations of Thompson and Murphy in the events. Thompson argues that there is no conceivable way in which the jury could have found Thompson involved in duping Murphy. If that were so, then Murphy's experienced counsel wasted much time and his client's money in even trying this case, because his only defense to the jury was that he was not aware that there was money in the briefcase. Other evidence in the case demonstrated Thompson's awareness of the actual (128) situation presented by the sheik's representatives to the congressmen. Under all the evidence, therefore, the jury could reasonably and rationally have found that Criden and Thompson were aware that money was to be passed at the meeting but that Murphy was not. The jury obviously did not ultimately interpret the facts that way because they also found Murphy guilty, but at least they did, or reasonably could have, interpreted Murphy's culpability as being differently based than that of Thompson.

Thompson also complains about the court's supplementary instructions to the jury in response to their

notes during deliberations. As indicated under the Murphy motions above, these arguments were carefully reviewed on the record at trial and need not be rehashed here.

Defendant Thompson's motions are therefore denied.

(129) X. CONCLUSION

In these three cases the congressional defendants were caught on videotape in flagrante delicto,[26] accepting money in relation to their official conduct as public servants. By overwhelming evidence the other defendants were proven guilty of aiding and abetting the Myers bribery. None of the defendants was a "deprived" citizen. All of them occupied honored, well-rewarded, and highly respected positions in our society. Four of them sat in the highest legislative body of the country. Another, a former state prosecutor, was a respected lawyer in a well-known law firm, serving in an ancient and honorable profession. Still another combined a legal career in the same firm with a political career in Philadelphia's local government. The seventh occupied a dual position of public trust as mayor of

a large city and state senator of New Jersey. Despite their respected and trusted positions, defendants' crass conduct here reveals only greed, dishonesty and corruption. Their major defense has been that they were tricked into committing the crime on videotape.

The government's need to unmask such conduct more than justifies the investigative techniques employed in these cases. Without question these convictions were reliable, and no constitutional right of any defendant (130) has been infringed. While the government's conduct of the investigation was not flawless, the overall work of the FBI, of the Eastern District Strike Force and of their superiors in the Department of Jusitce reflects a moderate, fair, careful approach to an undercover investigation which suddenly and unexpectedly proved effective in uncovering corruption in Congress.

The investigators on Long Island and their supervisors in Brooklyn kept extensive records and provided reasonable information to their superiors in Washington. Contrary to defendants' claims, this was not a runaway investigation.

True, it moved fast, impelled by greedy middlemen and cooperative corrupt public officials who appeared so frequently they made life hectic for the investigators. In large measure, the undercover agents and the FBI were able to keep straight the various deals with the corrupt officials. Their record-keeping fell behind at times, but always the evidence of the crucial meetings was accurately and permanently secured in the videotape cassettes.

In addition to the court the particular points discussed in this decision, the court has considered all the other arguments raised in the pre-hearing, mid-hearing, and post-hearing submissions of counsel and has found them lacking in merit. After careful consideration of the many problems (131) raised about Abscam over the course of these cases, which have now covered approximately one year, this court is satisfied that all of the defendants were proved guilty beyond a reasonable doubt, that the trials accorded to them were fair, that the arguments advanced for setting aside the convictions and dismissing the indictments on "due process" grounds are without merit,

and that there are no circumstances requiring a new trial for any of the defendants.

Accordingly, all of the defendants' motions directed to the verdicts and to the indictments are denied. Defendants Myers, Criden, Errichetti, Johanson, Thompson, Murphy and Lederer are directed to appear before this court in the ceremonial courtroom of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for sentencing on August 13, 1981, at 10:00 a.m.

SO ORDERED.

Dated: Westbury, New York

July 24, 1981.

GEORGE C. PRATT
U.S. DISTRICT JUDGE

FOOTNOTES

1/ Only Lederer was tried at that time. By agreement, trial of defendants Errichetti, Johanson and Criden has been deferred pending the outcome of the trial and conviction in Myers. The government agreed that if these defendants are convicted and sentenced in Myers and if their convictions survive appellate review, then the government will move to dismiss the charges against them in Lederer.

2/ Only Thompson and Murphy were tried. Criden's trial was deferred by the same agreement described in note 1, supra. On the government's unopposed motion, Silvestri's trial was severed. Since then the court has been informed by counsel that Silvestri may be indicted in still another Abscam case, in which event the government would pursue the new indictement and dismiss EDNY #CR 80-00291 against him.

3/ Only Jannotti and Schwartz were tried, Criden and Johanson having been severed because of their earlier conviction in Myers. After Judge Fullam's dismissal of the charges against Jannotti and Schwartz, see section VII, infra, the government moved to dismiss this case as against Criden and Johanson.

4/ Only Williams and Feinberg were tried. Errichetti was severed on an agreement similiar to that entered into for the Lederer case. See note 1, supra. Katz was severed because his poor health prevented his going to trial when the case was otherwise ready for trial.

5/ This is not a "pure" Abscam case, because only a relatively small part of it involves the undercover agents. The significant role in revealing alleged corruption in the awarding and administering of contracts for constructing sewer systems in Long Island, New Jersey and Conneticut. Errichetti has been severed on an agreement similar to

that entered into in Lederer and Williams. See note 1, supra.

6/ This instruction to the jury, that an interstate travel conviction was contingent upon Murphy's guilt of bribery, appears to the court now to have been more restrictive of the government and more favorable to defendant Murphy than the law requires.

7/ Of course, the idea that some congressmen may be dishonest or "on the take" is neither novel nor without foundation (133) in our history. In this particular investigation, however, the undercover agents were not acting on any prior accusations of misconduct against any of these defendants.

8/ Although some courts have required the defendant to admit commission of the crime before he can raise the entrapment defense, e.g., Sylvia v. US, 312 F2d 145 (CA 1), cert. denied, 374 US 809 (1963); US v. Johnston, 426 F2d 112 (CA7 1970); US v. Watson, 489 F2d 504 (CA3 1973), the more recent view of the Second Circuit is that a defendant may deny having committed the crime and simultaneously claim that he was entrapped into the conduct which is claimed to be criminal. US v. Valencia, No 79-1365-66 (CA2 Mar. 5, 1981) (amending opinion of Sept. 18, 1981).

9/ This theory has been argued by the defendants here, bolstered by the assertion that "every man has his price". No caselaw has been offered in supoort of this theory of "objective" entrapment. Moreover, even assuming that "every man has his price," that fact does not under any know legal precedent require dismissal of charges against the man who "price" has been determined and illegally paid. At least as to those who violate a public trust, if they accept their "price" for being corrupt, they should also pay the penalty when caught in the act.

10/ When invoked to dismiss an indictment, a federal district's court's supervisory power over law enforcement appears to be more theoretical than real. It is to be applied with caution even when a defendant asserts a violation of his own rights. Much less may it be applied when a defendant relies upon the infringement of another person's rights or on generalized incidents of "misconduct". US v. Payner, _US _, 100 SCt 2439 (1980). Even "knowing constitutional rights" is insufficient to warrant dismissal of an indictment. In short, there must be "a restrained application of supervisory power". Id. At 2446. "After all, it is the defendant, and not the constable, who stands trial." Id.

A further problem with the court's supervisory power is that a district court is not granted power under the Federal Rules of Criminal Procedure to dismiss an indictment "in the interests of justice". That consideration authorizes only a new trial. US v. Brown, 602 F2d 1073 (CA2 1979); US v. Lai Ming Tanu, 589 F2d 82 (Ca2 1978).

11/ As noted earlier, Sherman resulted in dismissal because there was "entrapment" as a matter of law.

(134) 12/ Except for Twigg, no factors, either alone or in combination, have yet required dismissal of an indictment or conviction against a defendant found to have been predisposed to commit the crime. Of course, where there has been a direct violation of a defendant's particular constitutional rights, such as an illegal search and seizure, involuntary confession, Miranda violation, or infringement of right to counsel, appropriate sanctions have been imposed. When that occurs, there is no need to reach the constitutional issue raised here which presents a more amorphous, generalized concept of a fifth amendment due process violation based on "outrageous" governmental conduct that does not directly affect a specific constitutionally protected interest of the defendant.

13/ The decisions of Myers, Errichetti, Criden, Johanson, Thompson and Murphy to withhold entrapment from the jury was not oversight; on the contrary, it was a calculated move in each defendant's trial strategy.

14/ With defendant Murphy the word "monies" might better be substituted for "bribes," because the jury found him not guilty of bribery, but guilty of receiving a criminal gratutity and of conflict of interest. For present purposes, however, the principle remains the same.

15/ A closer analogy to Hampton would be if the FBI, in order to prosecute the middlemen Criden and eIrrichetti, to them "undercover" congressmen to accept the bribe. Clearly, that did not occur here. On this record it is apparent that, using their own resources and without assistance or even directions by the agents, the middlemen sought and produced congressmen who would take the money.

16/ The government claims that with respect to at least some of the defendants it does have such information available. The supporting exhibits proffered at the hearing, DP Exs. 80, 81, 82, & 83, were excluded from evidence when the government refused to identify for defendants its sources of information. The government requested that the issue remain open for further evaluation in the event the court should conclude that a lack of predicate information was fatal to the government's case. Since the court has concluded that prior suspicion of criminal conduct by these defendants was not a constitutional predicate to offering them Abscam money, no further attention need be direct to the excluded exhibits.

17/ In another Abscam incident, agent McCarthy became flustered and thrust an open briefcase containing $100,000 (135) at the public official. This action was criticized by Errichetti as too abrupt, and he explained that more subtle

means must be used to avoid embarassing the public officials.

18/ The Second Circuit, in United States v. Viviano. 437 F2d 295 (1971), commented that the element of inducement relates to simply to the government's initiation of the crime and not the degree of pressure exerted. "The degree of pressure is properly considered under the element of propensity, as it has direct bearing on the accused's willingness to respond to the inducement of the agent." 437 F2d at 299 n.2.

Since subjective entrapment is removed from this case by the jury's verdict against Lederer and by the other of the inducement is considered here only in connection with defendants' claim that the agent's conduct was "outrageous".

19/ Indeed, when considering the accurary and details of what happened when the crime was committed one might fairly compare the shadows in Plato's cave with the usual trial based on mere oral testimony, and the reality outside the cave with the videotaped evidence in this case. See Plato, The Republic, Book VII, 546 (Viking Press, Inc., 1948) (S. Buchanan ed.).

20/ See section VI-B-1 supra.

21/ Of course, "missing" tapes would permit inferences favorable to a defendant, and defendants argued this point to the juries. They do not, as the Myers defendants now argue, require such inferences.

22/ There was some controversy over an incident involving a New Jersey state official that occurred some three months before the Williams incident. The recording, however, is difficult to decipher and provides little useful evidence. Even if Weinberg then spoke as he later did to Williams, there is no evidence that he did so with any of

these defendants, who took their bribes five and seven months later.

23/ R. Green, The Sting Man (Elsevier-Dutton Pub. Co., Inc. 1981).

24/ Leaks of information about pending prosecutions is a matter of grave concern to this court as it is to all those interested in the integrity of our judicial processes. Particularly objectionable here was the public bragging (136) of one nationally syndicated columnist that his assistants had been able to view tapes and transcripts that a federal judge had order sealed. Had they caused prejudice in any of these cases, such knowing violations of an order of the United States District Court would surely have precipitated criminal contempt charges. However, since the columnist in question was read by very few of the jurors, and had obviously influenced none of them, the time and effort required by such an investigation and possible prosecutions would not be justified. Government employees should be aware, however, that to receive something of value from that columnist or from any member of the news media in return for making available to them documents, tapes or testimony sealed by court order, might very well make them guilty not only of contempt but also of violating some of the same sections of the criminal code -- bribery, criminal gratutity and conflict of interest -- that proved the undoing of the Abscam defendants themselves.

25/ Judge Fullam also seemed to be considerably influenced by what he assumed to be the adverse consequences of the "coaching" incident involving Senator Williams. See section VI-B-1, supra. His information about that incident was limited, however, to what others had said about it, for he did not then have the benefit of Senator Williams' own testimony. One wonders whether the incident would have carried as much impact in his due process calculus had Judge Fullam then been enlightened

by Senator Willaims' testimony that he was not influenced by Weinberg's "coaching".

26/ Latin: "in the very act of committing the offense. ,lit., in blazing crime, i.e., in the heat of the evil deed." The Random House Dictionary of the English Language, The Unabridged Edition. (1971).

DECISION OF U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 8, 1980, IN UNITED STATES v. MYERS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1557—September Term, 1979

Argued: July 25, 1980 Decided: August 8, 1980)

Docket No. 80-1309

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL O. MYERS,

Appellant.

Before:

VAN GRAAFEILAND and NEWMAN, *Circuit Judges*, and NEAHER, *District Judge.**

Appeal from an order of the District Court for the Eastern District of New York (Jacob Mishler, Judge),

* Of the United States District Court for the Eastern District of New York, sitting by designation.

denying a motion to dismiss an indictment alleging bribery offenses against a Member of Congress.

Affirmed.

NEIL E. JOKELSON, Philadelphia, Pa. (Rochelle Newman, Philadelphia, Pa., Plato Cacheris, Wash., D.C., on the brief), *for defendant-appellant.*

EDWARD R. KORMAN, U.S. Atty., Brooklyn, N.Y., *for appellee.*

NEWMAN, *Circuit Judge:*

The Executive Branch of the Government of the United States has carried out a plan to determine whether members of the Legislative Branch and others would commit bribery offenses if presented with the opportunity to do so. In a constitutional democracy this maneuver inevitably raises sensitive issues of public policy and public law. We are asked to consider some of those issues of law on this appeal by a Member of Congress from the denial of his motion to dismiss one of the so-called Abscam[1] indictments. After careful consideration of the issues raised on appeal at this

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1 "Abscam" is a coined word from the first two letters of "Abdul Enterprises Ltd.," the name given to the fictitious Middle Eastern business that the undercover agents invented for purposes of the investigation that led to these indictments, and the word "scam," a slang expression, perhaps derived from "scheme," meaning a confidence game or swindle. Webster's New World Dictionary 1270 (2d college ed. 1978).

pretrial stage of the case, we affirm the denial of the motion to dismiss the indictment.

FACTS

On May 27, 1980, a grand jury in the Eastern District of New York returned a three-count indictment against four defendants including appellant Michael O. Myers, United States Representative from the First Congressional District of Pennsylvania. The other defendants are Angelo J. Errichetti, the Mayor of Camden, N.J., and a New Jersey State Senator; Louis C. Johanson, a member of the Philadelphia City Council and a member of a Philadelphia law firm; and Howard L. Criden, a member of the same law firm.

The indictment alleges the following essential facts. Three agents of the Federal Bureau of Investigation and a private citizen, acting in an undercover capacity, purported to be representatives of Middle Eastern businessmen seeking to invest money in the United States and to immigrate to this country. Defendant Errichetti told one of the FBI agents that Congressman Myers would assist the "businessmen" to enter and remain in the United States in return for a cash payment of $100,000. Myers received from the FBI agent $50,000 in return for his promise both to introduce private immigration bills permitting the "businessmen" to remain in the United States and to take other necessary action including intervention with the State Department. Myers divided the $50,000 with the co-defendants, keeping $15,000 for himself. Later Myers, having been told by the co-defendants that his own share would be $50,000, met with two of the FBI agents and demanded and agreed to receive an

additional $35,000. In the course of these events the defendants traveled from locations in Pennsylvania and New Jersey to locations within the Eastern District of New York, where the initial $50,000 was received.

The indictment alleges three offenses based on these facts. Count One alleges a conspiracy in violation of 18 U.S.C. § 371 (1976) to defraud the United States and to violate 18 U.S.C. § 201, punishing bribery and the receipt of bribes by public officials including Members of Congress. This count alleges that the conspiracy sought to defraud the United States of the Government's right (a) to the honest service of Congressman Myers "in relation to matters before the House of Representatives performed free from corruption . . ."; (b) to have the "official action" of Congressman Myers "in attempting to influence decisions of departments and agencies of the United States in relation to matters of immigration and residency performed free from corruption . . ."; (c) to have the immigration laws "administered honestly and impartially, free from improper and undue pressure and influence"; and (d) to have officials enforcing the immigration laws "perform their official duties free from impairment and obstruction by the exercise upon them of corrupt . . . pressure and influence." The conspiracy to violate § 201 is alleged to consist of the defendants' agreeing to demand and receive money for Congressman Myers in return for the Congressman's "being influenced in his performance of official acts . . . ."

Count Two alleges that Congressman Myers, aided and abetted by the other co-defendants, sought and agreed to accept money in return for "being influenced in his performance of official acts as a member of

Congress, to wit, his decisions and actions in a matter involving immigration, residency and citizenship of foreign nationals which might at any time be pending or which might by law be brought before the House of Representatives and departments" of the Government, in violation of 18 U.S.C. §§ 201(c) and 2. Count Three alleges that all four defendants traveled in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. §§ 1952 and 2.

On June 10, 1980, Congressman Myers filed a motion to dismiss the indictment on various grounds, most of which assert constitutional objections grounded on either the Speech or Debate Clause, U.S. Const. art. I, § 6,[2] or the doctrine of separation of powers. On July 11, 1980, the motion was denied by the District Court for the Eastern District of New York (Jacob Mishler, Judge). Trial was scheduled for August 11, 1980. Myers appealed from the denial of his motion to dismiss on July 18, 1980. On July 22, 1980, the Government moved in this Court for summary affirmance. Since the next scheduled week in which fully submitted appeals are to be heard would not occur until August 18, after the scheduled trial date, this Court inquired of the parties whether they would be willing to argue the appeal on the merits on July 25, 1980, with an opportunity thereafter to submit briefs. There was no objection,[3] the appeal was heard on July 25, the

2 The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

3 At oral argument counsel for appellant expressed a preference for additional time to brief and argue this appeal, but acknowledged that he was prepared to argue the merits and, having submitted a full brief to the District Court, could file additional papers in this Court within a week.

appellant filed a brief on July 31, and the Government submitted a response on August 5.

APPEALABILITY

In *Helstoski v. Meanor,* 442 U.S. 500 (1979), the Supreme Court ruled that a Congressman was entitled to appeal, in advance of trial, the denial of a motion to dismiss an indictment where the motion alleged violations of the Speech or Debate Clause. Analogizing from the Double Jeopardy Clause, see *Abney v. United States,* 431 U.S. 651 (1977), the Court concluded that an appeal was available because the trial court's ruling had completely disposed of the defendant's claim and because the Speech or Debate Clause, when applicable, provides the kind of protection that should be vindicated by preventing a trial, rather than setting aside its outcome. Thus, appellant's contentions grounded on the Speech or Debate Clause are properly before us.

We also conclude that the reasoning of *Helstoski v. Meanor, supra,* entitles appellant to pre-trial review of his challenges to the indictment grounded on the doctrine of separation of powers. Though this doctrine does not provide as precise a protection as the Speech or Debate Clause, there are equivalent reasons for vindicating in advance of trial whatever protection it affords as a defense to prosecution on criminal charges. If, because of the separation of powers, a particular prosecution of a Member of Congress is constitutionally prohibited, the policies underlying that doctrine require that the Congressman be shielded from standing trial. Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the

Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.

Indeed, it would not be too extravagant to suggest that a Member of Congress should be entitled to pre-trial review of the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment. Though every member of the public has an interest in avoiding the strain, expense, and injury to reputation resulting from a trial on criminal charges even if the ultimate outcome, at trial or on appeal, will be favorable, the interests of Members of Congress in this regard are especially compelling. Their ultimate vindication in an appeal after conviction will come long after serious, perhaps irreparable, political damage has been inflicted. Moreover, though the distress and distraction of a trial may prove burdensome to many ordinary defendants with adverse consequences for others in family, employment, or other relationships with them, the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired. In the case of Congressmen, he is their sole voice and vote in the House of Representatives. Finally, the case for pre-trial review of legal defenses is bolstered by the same concerns that underlie the Speech or Debate Clause. The primary purpose for the appearance of that Clause in the Constitution was "to prevent intimidation by the executive and account-

ability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966). The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before any trial has occurred.

Against these weighty concerns is only the traditional interest in judicial efficiency that normally precludes piecemeal appeals. See *DiBella v. United States*, 369 U.S. 121 (1962); *Catlin v. United States*, 324 U.S. 229, 233-34 (1945); *Cobbledick v. United States*, 309 U.S. 323 (1940). That is a significant consideration in the general run of criminal litigation, but not very persuasive as to the extremely small class of criminal cases brought against Members of Congress. Moreover, it seems likely that when such cases arise, many of them, after *Helstoski v. Meanor, supra*, will precipitate pre-trial appeals grounded on the Speech or Debate Clause. Without questioning the general unavailability of pendent appellate jurisdiction, see *Abney v. United States, supra*, 431 U.S. at 663, we simply note that little would be lost in the way of judicial efficiency if pre-trial appeals by indicted Members of Congress were to include all legal defenses.

We need not determine the full extent of pre-trial appellate jurisdiction in such cases. The claims of Congressman Myers are, with one exception, all grounded on either the Speech or Debate Clause or the doctrine of separation of powers, as to which appellate jurisdiction is either governed by or follows from *Helstoski v. Meanor, supra*. The one exception is the claim that the indictment fails to state an offense under 18 U.S.C. § 201 because of the Government's role and

the fictitious nature of the scheme in connection with which the offense was allegedly committed. We have concluded that it is appropriate to accept pre-trial appellate jurisdiction of this claim, determinable from the face of the indictment, along with the other issues.

THE MERITS

The merits of appellant's various contentions may conveniently be considered under three broad headings: challenges to the facial validity of § 201, challenges to the validity of § 201 as applied to the facts alleged in this indictment, and procedural challenges.

1. Facial validity of § 201. Appellant challenges the facial validity of § 201 on the grounds that the statute conflicts with the Speech or Debate Clause and the doctrine of separation of powers. These claims are wholly without merit in light of *United States v. Brewster*, 408 U.S. 501 (1972), and *United States v. Johnson*, *supra*. Those decisions squarely uphold the constitutional authority of Congress to enact § 201, creating the offense of bribery, including bribery of a Member of Congress. The decisions recognize that the Speech or Debate Clause imposes significant limits on the prosecution of congressional bribery. Conduct that falls within the broad category of legislative action may not be charged as an offense under the statute, nor may evidence of a Member's legislative action be offered in evidence against him. *United States v. Brewster*, *supra*, 408 U.S. at 510; *United States v. Johnson*, *supra*, 383 U.S. at 184-85; *United States v. Helstoski*, 442 U.S. 477 (1979). But despite these limits, the facial validity of § 201 is clear.

2. Validity of § 201 as applied. Appellant next mounts a series of constitutional and statutory challenges to the validity of § 201 as applied to the facts alleged in the pending indictment. *United States v. Brewster, supra,* completely disposes of appellant's claim that the references in the indictment to legislative actions render the indictment invalid under the Speech or Debate Clause. As *Brewster* makes clear, "Taking a bribe is, obviously, no part of the legislative process or function," 408 U.S. at 526, and an indictment may validly allege a corrupt promise to take legislative action, even though the action itself is immune from prosecution. This case is unlike *Johnson,* where the prosecution was "dependent" on prohibited inquiries as to the circumstances surrounding and motivation for legislative action, there a speech on the House floor, 383 U.S. at 184, and precisely like *Brewster,* where the indictment alleged acceptance of money in return for a promise to take legislative action. This indictment charges Congressman Myers with accepting $15,000 and demanding an additional $35,000 for a promise to take further official action, including the enactment of private immigration bills. This indictment focuses the inquiry squarely on whether the money was taken and whether a corrupt promise was made.[4] Legislative actions are referred to in the indictment only for the entirely permissible purpose of detailing the nature of the corrupt promise

[4] The Fourth Circuit has ruled that portions of an indictment, though not in terms alleging conduct protected by the Speech or Debate Clause, may be shown to refer to protected conduct when assessed in light of evidence at trial. *United States v. Doudy,* 479 F.2d 213, 223-24 (4th Cir.), *cert. denied,* 414 U.S. 823 (1973). At this stage of this case, our review is limited to the face of the indictment.

allegedly made. The indictment contemplates no inquiry into the taking of any legislative action or the motivation for it.

Brewster is also a complete answer to appellant's next point that the conduct alleged in the indictment may not be prosecuted because it is "disorderly Behaviour" within the meaning of Article I, Section 5, Clause 2 of the Constitution, authorizing each House of the Congress to punish its Members.[5] The argument that acceptance of a bribe by a Member of Congress was peculiarly a matter appropriate for punishment exclusively by each House of the Congress was vigorously made in the dissenting opinions in *Brewster*, 408 U.S. at 541-44 (Brennan, J., dissenting); *id.* at 551-52, 563 (White, J., dissenting). The arguments focused primarily on the Speech or Debate Clause, relying on the Behavior Clause to show that immunity from Executive Branch prosecution did not insulate Members of Congress who corrupt the legislative process from the sanctions of their peers. In declining to find in the Speech or Debate Clause an immunity from prosecution for corrupt promises to take legislative action, the majority in *Brewster* necessarily rejected any contention that Congressional punishment power in such matters was exclusive. See also *Burton v. United States*, 202 U.S. 344, 367 (1906).

Appellant's final attack on the indictment's application of § 201 is not without substance. He contends that the statute may not be validly applied to an alleged bribe instigated by agents of the Executive Branch creating fictitious roles and a fictitious plot.

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5 The Disorderly Behavior Clause provides that "Each house may . . . punish its Members for disorderly Behaviour."

This contention is based on both constitutional and statutory grounds. The constitutional attack proceeds primarily from the doctrine of separation of powers, as illuminated by the policy underlying the Speech or Debate Clause to protect Members of Congress from intimidation by the Executive Branch. The statutory argument is simply that Congress has not authorized use of § 201 by agents of the Executive Branch to create fictitious situations to see if a Member of Congress might succumb to the temptation to accept a bribe. Before considering the merits of these constitutional and statutory arguments, it is important to bear in mind that they are conceptually and factually distinct from the traditional defense of entrapment, which will be available to defendant at trial if the evidence shows sufficient inducement by the FBI agents to shift to the Government the burden of proving the defendant's predisposition to commit the offenses charged. See *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). At this stage the defendant is not alleging entrapment;[6] his point is that the Constitution forbids

6 At the July 11 hearing before Judge Mishler, Congressman Myers, joining with defendants indicted in other Abscam cases, also contended that the indictment should be dismissed because the tactics used by the Government during its involvement in the criminal activity reached that "demonstrable level of outrageousness" that violates the Due Process Clause. *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring). In *Hampton* a three-member plurality acknowledged the possibility of a due process defense based on outrageous law enforcement conduct, but appeared to indicate that, as with the entrapment defense, the defendant's predisposition to commit the crime would make the due process defense unavailable. *Id.* at 490-91. However, five members of the Court indicated that a due process defense, based on outrageous law enforcement conduct, would be available and would not be defeated by evidence of the defendant's predisposition. *Id.* at 493-95 (Powell, J., with whom Blackmun, J., concurs, concurring), 497 (Brennan, J.,

or, alternatively, the statute does not authorize the Executive Branch to conduct a "scam" or "sting" operation to see if Members of Congress, without any inducement, will accept bribes.

The constitutional argument focuses essentially upon the risk of abuse.[7] If agents of the Government can confront Members of Congress with manufactured opportunities to accept bribes, there is created the risk that malevolent officials of the Executive Branch will one day select as targets for a bribery sting particular Senators or Representatives in political disfavor with the President.[8] The argument further maintains that if this occurs, such political targeting, though doubtless prohibited by the First Amendment, *cf. United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), will be infrequently detected. The argument does not assert that Members of Congress have a constitutional

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with whom Stewart and Marshall, JJ., concur, dissenting). The due process defense has been upheld by a divided panel of the Third Circuit, *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978). *See also United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973).

Judge Mishler took under advisement the motion to dismiss on due process grounds and the request for an evidentiary hearing in support of that claim. The due process claim is not before us on this appeal, and we express no views on its merit or whether, in the event of denial, it would be reviewable before trial.

7 A possible additional argument is that a bribery sting subjects Members of Congress to the risk of erroneous conviction. While no system of law enforcement can totally eliminate that risk, it is difficult to believe that the risk is enhanced by a sting operation. On the contrary, because the operation is planned by government agents and can be carried out, as this one was, with a film or videotape record of critical events, the chances of an erroneous conviction would seem to be markedly less than in "real" bribe cases, where frequently the only available evidence is the discreditable testimony of the person who paid the bribe.

8 Appellant also claims that this has occurred in this case, a point considered *infra*.

immunity from prosecution for bribery. It simply maintains that the public interest in deterring bribery of Members of Congress can be adequately served by prosecution of those who accept bribes under "real" circumstances, without the added threat of prosecution for bribes accepted in response to manufactured opportunities.

Forceful arguments are available in response to these concerns. Any Member of Congress approached by agents conducting a bribery sting operation can simply say "No." Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that the Executive Branch would successfully use these tactics for political reprisal. Additionally, as the Government points out, bribery is a secretive enterprise, not likely to be detected as long as the bribe giver and taker maintain their silence. A sting operation, it is urged, provides a needed law enforcement weapon. Finally, emphasis is placed on the high public interest in guarding against corruption in the legislative process. The known availability of a bribery sting can act as a powerful deterrent.

Having examined these competing considerations, we conclude that they involve choices of public policy, rather than constitutional imperatives. Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant. The normal constitutional and statutory protections of the criminal process of course remain available to the accused. Those

protections include the defense of entrapment, but that defense is not established simply because government agents "afford opportunities or facilities for the commission of the offense," *Sorrells v. United States, supra,* 287 U.S. at 441, or engage in "deceit." *United States v. Russell,* 411 U.S. 423, 436 (1973). If the public policy concerns that have been identified warrant additional restrictions on the prosecution of Members of Congress for bribery, such restrictions are matters for consideration by those with public policy responsibilities, administrators in the Executive Branch and ultimately law-makers in the Legislative Branch. In *Brewster* the Supreme Court pointed out that if that decision underestimated "the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws." 408 U.S. at 524. By the same token, if the risks of a bribery sting operation outweigh its benefits, Congress always has the power to make the more limited modification of redefining the offense to exclude, in the case of Members of Congress or others, acceptance of bribes offered by undercover agents of the Government. With the policy choice thus fully within the control of Congress, we cannot conclude that the separation of powers doctrine creates a constitutional barrier to the law enforcement technique selected by the Executive Branch.[9]

Appellant's statutory objection to a bribery sting operation is also unavailing. Section 201 in terms

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[9] Appellant also seeks to bolster his challenge to a bribery sting operation by contending that a prosecution founded on this technique presents a political question inappropriate for the Judicial Branch. This is simply another way of characterizing the public policy issues that are available for resolution by Congress.

immunity from prosecution for bribery. It simply maintains that the public interest in deterring bribery of Members of Congress can be adequately served by prosecution of those who accept bribes under "real" circumstances, without the added threat of prosecution for bribes accepted in response to manufactured opportunities.

Forceful arguments are available in response to these concerns. Any Member of Congress approached by agents conducting a bribery sting operation can simply say "No." Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that the Executive Branch would successfully use these tactics for political reprisal. Additionally, as the Government points out, bribery is a secretive enterprise, not likely to be detected as long as the bribe giver and taker maintain their silence. A sting operation, it is urged, provides a needed law enforcement weapon. Finally, emphasis is placed on the high public interest in guarding against corruption in the legislative process. The known availability of a bribery sting can act as a powerful deterrent.

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9 Appellant also seeks to bolster his challenge to a bribery sting operation by contending that a prosecution founded on this technique presents a political question inappropriate for the Judicial Branch. This is simply another way of characterizing the public policy issues that are available for resolution by Congress.

neither expressly authorizes nor prohibits a bribery prosecution founded on a government agent's offer of money. Thus, the question is whether we should read into the statute a limitation of such prosecutions in the absence of explicit authorization, or apply the statute without such limitation until such time as Congress explicitly places it there. We conclude that the latter approach is more consonant with a court's traditional role in statutory interpretation. Congress first defined the offense of bribery of a Member in 1862. Ch. 180, 12 Stat. 577. In 1962 Congress recodified and consolidated various bribery statutes into one comprehensive law (now § 201 of the Criminal Code) punishing bribery of any "officer or employee" of the United States, specifically including Members of Congress. Pub. L. No. 87-849, 76 Stat. 1119. The broad coverage of § 201 precludes any interpretation that it contains within it a limitation on the manner of prosecution of one category of persons covered. On the contrary, the Senate Report on the 1962 bill specifically noted that it "would not restrict the broad scope of the present bribery statutes as construed by the courts." S. Rep. No. 2213, 87th Cong., 2d Sess. 4 (1962). That broad scope includes the full range of investigative techniques, including undercover activity.

Appellant also contends that the indictment fails to allege an offense covered by § 201 because of the fictitious circumstances surrounding the corrupt promise allegedly made. This claim is without merit. The offense described by § 201 is complete upon a Congressman's corrupt acceptance of money in return for his promise to perform any official act. The elements of the offense are the receipt of money, the making of the promise, and the corrupt purpose with

which these things are done. *United States v. Brewster, supra,* 408 U.S. at 526-27. The promise does not cease to relate to an official act simply because the undercover agent offering the bribe knows that the subject of the promised legislative action is fictitious and that the promise will not actually be performed. The statute condemns the Congressman's actions and state of mind. His alleged promise to introduce private immigration bills is a promise to perform "any official act." 18 U.S.C. § 201(c).

3. Procedural challenges. Appellant's first procedural challenge claims that he is the victim of selective prosecution of "disfavored legislators." (Motion to dismiss, ¶ 26). Viewed as a traditional challenge to the discriminatory enforcement of the criminal law, see *United States v. Berrios,* 501 F.2d 1207 (2d Cir. 1974), the claim was properly rejected by the District Court. To shift to the Government the burden of proving that a decision to prosecute is free of discriminatory taint, a defendant must show "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *Id.* at 1211 and cases there cited. Appellant has made no claim whatever that any others similarly situated have not been prosecuted, nor has he supplied by affidavit or otherwise any support for his conclusory allegation that he is a "disfavored" legislator. Frequent opposition to

the Administration and some indication of the Administration's displeasure would be matters readily within the knowledge of a "disfavored" legislator.

However, it seems clear from appellant's written and oral arguments that his selective prosecution claim extends beyond the traditional challenge to an improperly motivated prosecution. Again emphasizing the policy of the Speech or Debate Clause to prevent the Executive Branch from intimidating Members of Congress, appellant asserts that intimidation inheres in a bribery sting prosecution simply because the Executive Branch retains the discretion to decide which Members of Congress will be confronted with the opportunity to accept a bribe. Though "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," *Oyler v. Boles*, 368 U.S. 448, 456 (1962), appellant maintains that unfettered discretion does encounter constitutional barriers in the circumstances alleged to have occurred in this indictment. The consequence of this argument need not be an immunity of Members of Congress from bribery stings initiated by the Executive Branch; one appropriate safeguard might simply be a requirement that the Executive Branch demonstrate some basis of suspicion (short of probable cause) before deciding to make any Member of Congress the target of a sting.

Without assessing the public policy merit of such a safeguard, we conclude that it is not required by the Constitution. The Speech or Debate Clause limits the conduct of a Member that may be made the basis of a prosecution and limits the evidence that may be used against him, the equal protection principle of the Fifth Amendment's Due Process Clause and the First Amendment protect a Member against a prosecution

improperly motivated, the entrapment defense and very likely the Due Process Clause protect a Member against a prosecution improperly conducted, and the Fifth Amendment assures a Member that no prosecution may be initiated unless a Grand Jury returns an indictment. Just as we have left to Congress the public policy choice of whether to prevent sting operations, we find it equally appropriate to let Congress determine whether to create any special requirements for the initiation of such operations.

Appellant's second procedural claim is that the indictment should be dismissed because the grand jury that returned it heard some evidence of legislative acts that is privileged by the Speech or Debate Clause. Normally, an indictment is not subject to dismissal on the ground that there was "inadequate or incompetent" evidence before the grand jury. *Costello v. United States*, 350 U.S. 359, 362 (1956). This rule has been specifically applied to reject a claim that a grand jury heard some evidence protected by the Speech or Debate Clause. *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). See also *United States v. Helstoski*, 576 F.2d 511, 519 (3d Cir. 1978), *aff'd without consideration of this point, sub nom. Helstoski v. Meanor*, 442 U.S. 500 (1979); contra, *United States v. Helstoski*, Crim. No. 76-201 (D.N.J. Feb. 27, 1980) (unpublished). The procedural history of *Johnson* makes it especially instructive. Congressman Johnson's original conviction on both substantive and conspiracy counts was reversed by the Fourth Circuit. 337 F.2d 180 (1964). The Supreme Court agreed that retrial was necessary because a portion of the conspiracy count specifically charged conduct protected by the Speech or Debate Clause. 383 U.S. at 176-77.

However, the Supreme Court remanded for a new trial on the original indictment, requiring only deletion of that portion of the indictment charging protected conduct. *Id.* at 185. Though the grand jury that had returned the indictment obviously had heard evidence of the protected conduct, which it had specifically alleged to be part of the conspiracy, the Supreme Court raised no objection to retrial on the redacted indictment. On appeal from Johnson's second conviction, the Fourth Circuit considered and rejected his challenge to the grand jury's receipt of privileged evidence. 419 F.2d at 58. We agree with the conclusion reached by the Fourth Circuit, which appears to be the implicit conclusion of the Supreme Court as well.[10]

Appellant's final procedural point is that the indictment should be dismissed because it "requires and/or contemplates the government to present and/or the defense to have the opportunity to present" at trial evidence protected by the Speech or Debate Clause. (Motion to dismiss ¶ 9). The prohibition against the Government's use of privileged evidence is clear, *United States v. Brewster, supra; United States v. Helstoski, supra.* Since the indictment alleges a promise to perform a legislative act and not the performance of the act, there is no reason to assume that at trial the Government will be unable to abide by the constitu-

10 We need not consider whether an indictment might be subject to a motion to dismiss in the event that the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether the grand jury had sufficient competent evidence to establish probable cause. In this case Judge Mishler noted at the argument on defendant's motion to dismiss that extensive tapes and recordings were before the grand jury, referring to the episodes in which money was received allegedly in return for corrupt promises. (Tr. July 11, 1980 hearing 37).

tional restriction upon its evidence. Whether the appellant will choose to offer evidence of his own legislative acts is, at this point, a matter of speculation. Even should he elect to do so, we do not believe his introduction of such otherwise privileged evidence would violate the Speech or Debate Clause. The protection against being "questioned" outside of Congress prevents the use of legislative acts against a Member. It does not prevent him from offering such acts in his own defense, even though he thereby subjects himself to cross-examination.

In sum, we recognize that the initiation of this prosecution raises sensitive issues of public policy, matters well worth the thoughtful consideration of the public and their elected representatives. Our task, however, is confined to determining whether the limits of the Constitution and the law have been exceeded. Satisfied that they have not, we affirm the order denying dismissal of the indictment. The mandate shall issue forthwith.

DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 26, 1980, AFFIRMING THE DENIAL OF A MOTION TO DISMISS THE INDICTMENT

UNITED STATES of America, Appellee,

v.

John M. MURPHY, Frank Thompson, Jr., Appellants.

Nos. 1577, 1587, Dockets 80-1299,80-1307.

United States Court of Appeals, Second Circuit.

Argued Aug. 22, 1980.
Decided Aug. 26, 1980.

United States congressmen who were indicted in Abscam indictments appealed from a ruling of the United States District Court for the Eastern District of New York, Jacob Mishler, Jr., denying their motion to dismiss the indictment charging various offenses related to solicitation and acceptance of bribes.

The Court of Appeals held that the indictments would not be dismissed on basis of speech or debate clause where essence of bribes in return for corrupt promises to take official action, conduct beyond the protection of the speech or debate clause, and where there was no claim that the grand jury did not hear significant and sufficient evidence unprotected by the speech or debate clause.

Affirmed.

Indictment and Information -- 144.1(1)

Abscam indictments brought against United States congressmen charging them with various offenses related to solicitation and acceptance of bribes would not be dismissed on basis of speech or debate clause where essence of all the allega-

tions was the acceptance of bribes in return for corrupt promises to take official action, conduct beyond protection of speech or debate clause, and where there was no claim that grand jury did not hear significant and sufficient evidence unprotected by speech or debate clause. 18 U.S.C.A. §§ 201, 201(c, g), 203, 203(a), 371, 1952; U.S.C.A. Const. Art. 1, § 6, cl. 1.

Michael E. Tigar, Washington, D. C. (Samuel J. Buffone, John J. Privitera, Washington, D. C., on the brief), for appellant Murphy.

Daniel A. Rezneck, Washington, D. C. (Clifford D. Stromberg, Robert N. Weiner, Arnold & Porter, Washington, D. C., Stephen E. Kaufman, New York City, on the brief), for appellant Thompson.

Edward R. Korman, U. S. Atty., Brooklyn, N. Y., for appellee.

Before NEWMAN and KEARSE, Circuit Judges, and DUMBAULD,* District Judge.

PER CURIAM:

Congressmen John M. Murphy and Frank Thompson, Jr. appeal, prior to trial, from a ruling of the District Court for the Eastern District of New York (Jacob Mishler, Judge) denying their motion to dismiss an indictment charging various offenses related to solicitation and acceptance of bribes. This is another of the so-called Abscam indictments, only recently considered by this Court in United States v. Myers, 635 F.2d 932 (2d Cir. 1980).

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* Hon. Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The five-count indictment names as defendants the two appellants, Howard Criden, a Philadelphia attorney, and Joseph Silvestri, who is not otherwise identified in the indictment. Count One charges all four defendants with violation of 18 U.S.C. § 371 (1976) by conspiring to defraud the United States and to violate 18 U.S.C. §§ 201 and 203 concerning bribery of public officials. Count Two charges Murphy and Thompson, aided and abetted by Criden, with violation of 18 U.S.C. §§ 201(c) and 2 (aiding and abetting). Count Three charges Murphy and Thompson, aided and abetted by Criden, with violation of 18 U.S.C. §§ 203(a) and 2. Count Four charges Criden, aided and abetted by Murphy and Thompson with violation of 18 U.S.C. §§

1952 (interstate travel to carry out bribery) and 2. Count Five charges Murphy, aided and abetted by Thompson and Criden, with violation of §§ 201(g) and 2. As in Myers, the facts alleged in support of these charges arise out of an elaborate undercover "sting" operation, in which F.B.I. agents and a private citizen, posing as representatives of wealthy Middle Eastern businessmen, offered substantial sums of cash to each of the appellants, and the appellants accepted the cash in return for promises to take official action in behalf of the fictitious businessmen with regard to immigration and other governmental matters.

The appellants contend that the indictment is based on actions protected

by the Speech or Debate Clause, U.S. Const., Art. I, § 6, that the indictment will require the appellants to present information protected by the Speech or Debate Clause in their defense, that the grand jury that returned the indictment heard evidence protected by the Speech or Debate Clause, and that the District Court inadequately considered the motion to dismiss by failing to review transcripts of the grand jury proceedings.

Each of these contentions is available for pre-trial appellate review, Helstoski v. Meanor, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979); United States v. Myers, supra. On the merits, each claim is rejected, on the authority of Myers, which considered identical con-

tentions arising in circumstances not different in any material respect. The essence of all the allegations against the Congressmen is the acceptance of bribes in return for corrupt promises to take official action, conduct beyond the protection of the Speech or Debate Clause. United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972). In some instances, an overt act is alleged that may turn out, upon development of the facts at trial, to involve protected legislative action. For example, overt act number 20 alleges that Murphy and Thompson met in Washington with another Congressman. That overt act, as alleged in the indictment, is not on its face protected by the Speech or Debate Clause, but if an offer of proof at trial

indicates that it is protected when assessed in light of the other evidence, the appellants will be entitled to have that particular allegation stricken. See United States v. Dowdy, 479 F.2d 213 (4th Cir.), cert. denied, 414 U.S. 823, 94 S.Ct. 124, 38 L.Ed.2d 118 (1973).

Here, as in Myers, there is no claim that the grand jury did not hear significant and sufficient evidence unprotected by the Speech or Debate Clause, since the appellants have viewed videotapes of alleged acceptances of bribes. In such circumstances, the District Judge did not err in declining to review the grand jury minutes to determine whether the grand jury may have heard, in addition, some evidence of activity protected by the Speech or Debate Clause.

Since all of the claims raised by appellants are governed by the decision in Myers, the denial of the motion to dismiss the indictment is affirmed.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC, DATED SEPTEMBER 24, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs. Docket No. 81-1345

FRANK THOMPSON, JR.

Defendant/Appellant.

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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PETITION FOR REHEARING

It is respectfully suggested that the panel opinion "overlooked or misapprehended" many of the crucial facts of this case -- and, as a result, decided important legal issues on the basis of an erroneous understanding of their factual underpinnings. This is not particularly surprising, considering the multiplicity of parties; the voluminous record; the novel and complex legal issues involving many areas of criminal, evidentiary and constitutional law; and the many attorneys sharing the limited time available for oral argument and face-to-face exploration of the facts, law and policies involved both in the general situation of ABSCAM and the specific details of individual cases.

A. The Oversight or Misapprehension of the Unique Facts of the Thompson Case

In seeking a rehearing, defendant Frank Thompson once more cries out for individualized justice in the face of the steam-roller known as ABSCAM. The failure of the Court to give such individualized attention to Thompson's claims is emphasized by the Court's use at three separate and crucial points in its opinion of a quotation manufactured by the prosecution and which anyone who has taken the time and trouble to view and hear the all-important videotapes knows is inaccurate.[1]

The opinion keeps insisting that on October 9 at the Georgetown townhouse,

---

1. Footnotes appear following the Petition.

when FBI agent Amoroso/De Vito shoved a briefcase containing $50,000 in his direction, Thompson referred it to Howard Criden and said:

> "You look after that for me, will you."

The importance the Court placed upon that damning line is obvious from the fact that it appears on pages 15, 37 and 62 of the opinion (the first a general review of the facts, the second establishing the factual predicate for rejection of defendant's due process claims and the third affirming the sufficiency of the evidence). The difficulty is that Thompson never said those words, and the defense has consistently attempted to call to the Court's attention the fact that the quotation was manufactured

by the prosecution.[2] Anyone with normal hearing who has listened to that videotape knows that Thompson said:

> "You look at that for me, will you."

So there can be no doubt about the accuracy of defendant's representation, attached hereto is an affidavit of Dirk B. Van Zaanen, an audio engineer, attesting to the clarity of Thompson's words and the accuracy of the defense version.

The significance of that changed word cannot be overstated in light of the circumstantial nature of the government's case against Thompson. As distinct from many other ABSCAM defendants, Thompson denied ever receiving tainted money, and the government's case relies

almost exclusively upon hearsay and inferences to be drawn from ambiguous videotaped conversations.[3] The substitution of the word after for at in the disputed conversation is thus crucial to the Court's determination that Thompson's behavior pointed clearly and unambiguously to his knowledge that the briefcase contained bribe money. That conclusion is the predicate for the Court's blunt assertion that Thompson was merely being cautious and carrying out a "ploy" when he asserted at the first meeting on October 9 that "I'm not looking for any money." (App. 131)

It is this transformation of Thompson's rejection of a bribe into affirmative evidence of his corruption which is the lynchpin not only for the Court's

dismissal of his claim of insufficient evidence but also its deflection of most fundamental constitutional objections are disposed of with barely more analysis than a citation to the Court's earlier Myers I opinion, 635 F.2d 932 (1980). But in Myers I the Court had deflected the defendants' major statutory and constitutional arguments on the ground that "Any member of Congress approached by agents conducting a bribery sting operation can simply say 'no,' and adding that: "with a film or videotape record of critical events, the chances of an erroneous conviction would seem to be markedly less than in 'real' bribe cases where frequently the only available evidence is the discreditable testimony of the person who paid the

bribe." 635 F.2d at 938-9. In Myers II, the panel turns that "protection" into a Catch 22 -- by insisting that even when Thompson said "no" he meant "yes." It may well be that under appropriate circumstances juries can be permitted to reject professions of innocence as mere guile. But that is a far different proposition than the principle enunciated in Myers I -- and casually relied on by the panel in Myers II -- that there is no need to worry about abuse or miscarriage (or due process) when the evidence will always be clear and unambiguous.

The ambiguity of the case against Frank Thompson is further concealed in the panel opinion by several other instances in which important facts

inconsistent with the panel's scenario are misapprehended or overlooked, as follows:

* Facts Concerning the Initial Meeting on October 4, 1979: The initial personal contact was made by middleman Criden when an intermediary (Silvestri) called Thompson's Congressional office and requested an interview for the purpose of investing large sums of money in Thompson's Congressional District. The panel overlooks the fact that this meeting was recorded by Thompson's staff in his appointment book. Further, the panel wrote that when they met, "Criden and Thompson spoke privately." (Op. at 14). This is an error. Congressman Thompson's long-time lawyer confidante, Harvey Stern (who specialized in land and busi-

ness laws) was present throughout the meeting. (App. 497) The panel overlooked the fact that Thompson had asked Criden for the names of mutual friends as references, and at the close of the meeting called Judge Crumlish in Philadelphia, who gave Criden high marks. (App. 510) None of this conduct is indicative of a criminal conspiracy. Finally, the opinion states that on October 4 following the meeting with Thompson, Criden told Mel Weinberg that Thompson had agreed to assist the Arabs (Op. at 14), ignoring the fact that Criden had boasted he had Thompson "lined up" a week earlier, before he had ever met Thompson. (Appt's Brief at 15-16)

* Facts Concerning the First Meeting at the W Street Townhouse on Octo-

ber 9, 1979: Frank Thompson went with Criden at the noon hour to a W Street townhouse to meet with representatives of the Sheiks. The meeting was videotaped, and the FBI agents centered the discussion on private immigration bills. Overlooked by the panel are the facts that when the discussion began Thompson said it was a complicated problem and, significantly, he picked up a phone and called his immigration specialist, Jane Butterfield, to request that she consult with the Immigration and Naturalization authorities and prepare a memorandum. Again, this is not the action of one who has agreed to take a bribe. The panel correctly states that Thompson rejected the offer of money, saying, "I'm not looking for any money" but overlooks the

evidence that when asked "in plain English" if the Sheik could "depend on you to try to help him," Thompson replied

> "I'll be glad to help if I can, but you must understand the limitations of our law and the complications that there are in it." (App. 325-26)

* Facts Concerning the Interim Meeting at the W Street Townhouse: The Opinion correctly points out that after Thompson left the noon meeting, there was another meeting in his absence with the FBI agents and middleman Criden. But the Opinion overlooks the fact that on twenty-seven (27) different occasions FBI agent Amoroso expressed strong distrust of Criden, and accused him of trying to "rip him off," and walk off with the "package" of money. (Tr. 953)

The Opinion further misstates the facts when it says that the FBI agents "were willing to have Criden take the packag- as long as Thompson acknowledged the money." (Op. at 15) The FBI agents and Criden agreed to something entirely different:

> Criden: I'll try to get him to come out. Hand him the fuckin' attache case.
>
> Amoroso: I'll give him the attache case.
>
> Criden: No conversation except that here's some documents or shit like that.
>
> Amoroso: Alright. (App. 358-9)

* Facts Concerning the Final Evening Meeting at the W Street Townhouse: The Opinion correctly states that there was a third meeting that evening at th- W Street house, but overlooks that in

preparation for this meeting (which lasted no more than 15 minutes) Thompson had delivered to Criden both the memorandum on immigration problems prepared by his staffer, and the names of local Trenton banks in which the "Arabs" might deposit their money. In the context of Thompson's constantly expressed (and overlooked) concern to obtain "Arab" investments for his district, his statement to Criden to "look at" the contents of Amoroso's briefcase is totally consistent with his claim that he assumed the briefcase contained papers dealing with investments. In that context, neither is there anything sinister in the statement quoted by the panel (Op. at 25) to the effect that Thompson would be willing to

use his good offices to assist on future immigration problems for an individual with a large financial investment in his district.

Finally, the panel overlooks the fact that at the last meeting on October 9, Thompson again categorically rejected a suggestion that he would accept money from the Sheik, even as a campaign contribution. When Amoroso suggested that Criden might be "good for a $10,000 campaign contribution," Thompson immediately replied: "No, no ... I wouldn't take a ten thousand ..." (App. 395-6) He was interrupted by Amoroso, who cut him off and again changed the subject of conversation to investments in Thompson's Congressional District. This was the second rejection of money during one

afternoon. What more is required to rebut the panel's concept that Thompson was "play-acting?" Perhaps the information requested pursuant to Brady v. Maryland for the purpose of impeaching the credibility of the government's witnesses?

B. Facts and Law Overlooked and/or Misapprehended in Connection with the Brady Issues

Thompson's appeal brief raised four separate and distinct denials of his right under Brady v. Maryland, 373 U.S. 83 (1963), to information within the prosecution's knowledge or control suggesting bias or hostility or bearing upon the credibility of any government witness. The panel opinion responds to only one of those claims -- the withholding of information that Melvin

Weinberg had lied on the witness stand in an earlier ABSCAM case.

The panel ignored the equally significant claim that the government had deliberately concealed the fact that the witness who provided the only direct evidence against Thompson, Congressman Murtha, had been assured of immunity from prosecution. From the witness stand, Murtha denied a deal with the government. At the close of trial, prosecutor Puccio refused to stipulate that Murtha had been given immunity from future prosecution. Yet, it later developed that the Department of Justice had informed the House Ethics Committee, of which Murtha was the second ranking member, prior to trial, that no additional indictments

would be sought against members of Congress. (Appt's Brief at 155-6)

Another overlooked Brady point concerned the fate of the cash-filled briefcase which Criden took from the Kennedy Airport meeting with Congressman John Murphy on October 20, 1979. Cook testified that Criden told him that he had passed $25,000 to Thompson at a meeting on October 22, 1979 off the New Jersey Turnpike. Yet, at a meeting on January 10, 1980, FBI agent Brady (posing as a chauffeur) noticed that Criden still had the briefcase, which was recognizable by a burn mark. Agent Brady thought this important enough to file a written report. But the prosecution did not report this to the defense -- even though it had assigned a

unique and novel trial role for the tell-tale briefcases. Each tape opened with Agent Amoroso slowly counting out and depositing $50,000 into a briefcase, and during the trial the prosecution kept the briefcases in full view of the jury, like a bloody axe or a loaded gun. (Appt's Brief at 154)

Defendant's final Brady point involved documents concerning an alleged conflict of interest for Prosecutor Puccio growing out of negotiations between his friend, journalist Jack Neufield, and a publisher for the preparation of a book about ABSCAM in which Puccio was sought as a co-author. On this overlooked point, it is events subsequent to the argument in the Court

of Appeals which demonstrate more strongly than ever its vitality and the need for a reexamination by the Court.[4] On August 18, 1982, the counsel to the Senate Committee issued an interim report which reviewed the "Confidential ABSCAM files of the Federal Bureau of Investigation." (Attached hereto as Exhibit B.) That report revealed, for the first time to defendant's knowledge, that in ordering the investigation of Frank Thompson in October 1979, Puccio was violating a direct order of his superiors in the Department of Justice. The Senate report states:

> The documents also indicate that, as the operation progressed, the New York prosecutors did not follow specific instructions from ranking officials in the Department

of Justice who were attempting to assign responsibilities for various aspects of the operation to achieve the most effective arrangement. For example, on September 13, 1979, Deputy Assistant Attorney General Nathan met with prosecutors from New York and New Jersey and directed, among other things, that every prosecutable matter arising in New Jersey after September 11, 1979, was to be handled by the United States Attorney for the District of New Jersey. On October 5, 1979, Mr. Nathan disseminated to the New York prosecutors and others a memorandum directing that all subjects in New Jersey and Pennsylvania were to be chosen by the New Jersey prosecutors, with the advice of the Pennsylvania prosecutors; that all investigative activities in New Jersey and Pennsylvania were to be coordinated by the New Jersey prosecutors, and that Mr. Puccio was to inform the New Jersey prosecutors of his wish to investigate any other subject, with New Jersey prosecutors having a veto power over any such investigation unless and until they were overridden by Department of Justice officials in Washington, D. C. Nevertheless, between September 13, 1979, and October 19, 1979, the New York prosecutors

> apparently arranged for several meetings with New Jersey subjects and held some of those meetings without having informed the New Jersey prosecutors, and certainly without their approval or participation. (At 26-27)

Frank Thompson was one of those New Jersey citizens who was approached in New Jersey, and later in Washington, D. C., through the FBI apparatus controlled by Thomas Puccio in New York. This was in direct violation of the Department of Justice directives. Had Thompson been informed of this, as required by Brady, he would have had many more strings in his bow to support his basic contention that Prosecutor Puccio, because of his multiplicity of roles (like the Mikado) and his interest as a potential co-author, breached his prosecutorial obligations under Berger v.

United States, 295 U.S. 78 (1935), to see that "justice shall be done."

Generally, the Senate report confirms many of the other criticisms leveled by defendant (and seemingly rejected by the panel) against ABSCAM and the unreliability of the government's witnesses and thus is further support for petitioner's present application. But one other revelation is especially relevant to defendant's Brady arguments that the prosecution withheld exculpatory evidence. That involved the late ABSCAM defendant Kenneth McDonald, the vice-chairman of the New Jersey Casino Control Commission. McDonald was videotaped as being present at a "pay off" meeting with FBI agents and middleman Mayor Errichetti. The briefcase with

$100,000 was passed to Errichetti in the presence of McDonald, presumably for later delivery to McDonald. Yet Senate counsel concludes from the still confidential FBI records that Errichetti did not pass anything to McDonald. He either kept it for himself, or shared it with undercover agent Weinberg. (At 19) The report concludes:

> There is substantial evidence that Errichetti duped former Commissioner McDonald and pocketed that bribe. Thus, in at least one case, a clever middleman, rather than fearing bringing in an innocent party, might have deliberately ensnared an innocent official and kept the entire bribe or shared it with Weinberg. (At 32)

This is an exact parallel to the situation as presented by Frank Thompson in his defense. Had Thompson been informed of this earlier McDonald situation, he

could have presented it to the jury and thereby gained considerable credibility.

C. The Misapprehension of the Constitutional Dimensions of the Principle of Separation of Powers and Legislative Independence

The panel opinion never explains why the doctrine of legislative independence is less entitled to protection from arbitrary invasion by agents of the executive branch of government than is the right of a motorist to the unimpeded use of the highways. Compare Delaware v. Prouse, 440 U.S. 648 (1979). Relying on the decision in Myers I, decided in the absence of a factual record so clearly exposing the opportunities for abuse present in the Thompson facts, the Court concludes

that with the exception of Section 6 of Article I, the Speech or Debate Clause, "the Constitution does not provide Members of the Legislative Branch with any extra protections beyond those guaranteed to all citizens." (Op. at 20)

That conclusion ignores a fundamental piece of this nation's political philosophy and history. Thomas Jefferson wrote that "In order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions should be free from the cognizance or coercion of the coordinate

branches, Judiciary and Executive." 8 The Works of Thomas Jefferson 322 (Ford Ed. 1904). In the landmark decision in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 653-4 (1952) Mr. Justice Jackson spoke to the danger of executive encroachment upon legislative independence by asserting that the Presidency "exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness." (Concurring opinion) With the doctrine of separation of powers being part of the backbone of our political heritage, does this Court really wish to suggest that there are no constraints within our constitutional system which inhibit the kinds of executive branch intrusions into the legis-

process exemplified by ABSCAM? Defendant respectfully suggests this issue deserves fuller consideration than accorded by the panel opinion.

D. The Oversight of a Pretrial Defense Motion to Suppress the Videotapes Which Caused the Panel to Overlook Significant Constitutional Issues Concerning the Authority of the FBI to Surreptitiously Videotape Private Conversations of a Member of Congress

The panel opinion gives short shrift to defendant's substantial attack on the constitutionality of surreptitious videotaping of members of Congress, apparently under the misapprehension that the objection to the videotapes was waived by trial counsel by failure to submit a timely motion to suppress. (Op. at 63) Such a waiver claim was asserted by the government's brief to this Court, but

defendant pointed out in his reply brief that claim was erroneous. Footnote 4 of Appellant's Reply Brief states:

> The government's brief is in error when it claims defendant Thompson failed to make a timely motion to suppress the videotapes. Defendant's pretrial motion to dismiss the indictment on grounds of governmental overreaching, filed July 7, 1980, states: "Alternatively, the evidentiary fruits of these activities, including the videotapes ... should be suppressed." (At p. 22, n.12)

It is unclear to petitioner whether the panel overlooked that footnote and the facts contained therein or whether the panel thought that assertion in defendant's pretrial motion papers failed to qualify as "a timely motion to suppress." Petitioner assumes the former cause since he finds no authority for the proposition that a motion to

suppress must be in any special form -- indeed Rule 12(b) of the F.R. Cr. Pr. permits such a motion to be made orally. Cf. Foman v. Davis, 371 U.S. 178, 181 (1962).

Therefore, defendant assumes that the failure of the panel to give serious consideration to defendant's First-Fourth Amendment claim (Appt's Brief at 130-37), was mostly based on mootness concerns. The panel's reliance on United States v. White, 401 U.S. 745 (1971) and Lopez v. United States, 373 U.S. 427 (1963) is unpersuasive on the constitutional merits. ABSCAM video-taping was sui generis, having as little in common with the audio taping of suspected criminals as Orwell's ubiquitous Big Brother has in common with an "in-

quiring photographer." Defendant asks the Court to reexamine the waiver issue and, if it agrees that defendant did indeed make "a timely motion to suppress," to review the arguments set forth at pages 130-137 of Appellant's original brief.

Suggestion for Rehearing En Banc

The prestigious New Jersey Law Journal stated in an editorial on February 5, 1981:

> The ABSCAM proceedings now wending their way through the judicial system will determine whether there is a federal stomach capable of being turned [by fundamental unfairness ...]

The panel opinion answered that rhetorical question in the negative. The panel's stomach obviously was not even turned by the spectacle of a federal

agent urging a compliant middleman to ply a targeted Congressman with liquor in order to compromise him before the secret ABSCAM cameras. (App. 366) Some of the federal judges who have reviewed other ABSCAM proceedings have weaker stomachs.[5]

Judge Aldisert of the Third Circuit has likened ABSCAM to the machinations of the Gestapo. In his dissenting opinion in United States v. Jannotti, 673 F.2d 678, 613 (1982), joined by Judge Weis, he declared: "To the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear."

Two of the three Federal District

Judges who have thus far ruled on ABSCAM trials determined that the government's behavior violated principles of Due Process. Judge Fullam, who presided at the Jannotti trial, found that the government techniques employed "went far beyond the necessities of legitimate law enforcement." 501 F. Supp. 1182, 1204 (E.D. Penn., 1980). Judge Bryant, who presided at the Kelly trial in the District of Columbia, considered it "nothing short of outrageous" that federal agents had continued to pursue Congressman Kelly with bribe offers after he, like Thompson, had rejected the initial offer. "A suspicion-free subject should be exempted from further testing on the basis of winning the first battle against temptation."

United States v. Kelly, U.S.D.C., Dist. of Col., Docket No. 81-1346, slip opinion at page 22.

In the court below in this case, Judge Pratt, although upholding the prosecutions case, enunciated a 22-point standard for determining the permissible limits of government behavior under the Due Process clause pursuant to Hampton v. United States, 425 U.S. 494 (1976), and Justice Powell's concurring opinion therein, id. at 495 n.7. While Judge Pratt's application of his own standard is questioned by defendant, he at least articulated those elements which determined his decision.

The panel opinion, on the other hand, offers no real standards as to what constitutes "outrageous" government

behavior under the Due Process clause, merely asserting that "whatever governmental conduct might transgress the standards outlined" by the Supreme Court in Hampton and United States v. Russell, 411 U.S. 423 (1973) "the facts of the ABSCAM investigation are not even close to the line." (Op. at 33) As set forth above, some other respected federal judges, dealing with less compelling ABSCAM cases, felt it was not only close to the line, but well beyond it.

In view of the contrariety of opinion among Federal judges, the failure of the panel opinion to articulate a clear Due Process standard and the exceptional importance of this case to both the system of criminal justice and the functioning of the political process

in this country, defendant respectfully urges the Second Circuit to grant a rehearing en banc.

Respectfully submitted,

S/ Frank Askin

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September 24, 1982

FOOTNOTES

1. Government counsel Lawrence Sharf acknowledged in a letter to defense counsel on September 14, 1982 that the Court of Appeals panel never requested the October 9 videotapes for viewing. The panel did view the October 20 videotapes. See footnote 6 of the Court's opinion.

2. This was pointed out to the Court at pages 21-22 n.21 of the Brief for Defendant-Appellant Thompson, where it was commented: "Any careful listening to the tape will demonstrate that Mr. Puccio's version is pure wishful thinking on his part."

3. The only other evidence against Thompson is the testimony of Congressman Murtha as to allegedly incriminating statements made to him by Thompson. The Court's opinion completely ignored Thompson's Brady v. Maryland claim that the government had concealed from the defense and the jury the fact that Murtha had been granted immunity from prosecution in exchange for his testimony. See Point B, infra.

4. We refer here not merely to defendant's Brady claim, but the underlying claim that Puccio should have recused himself as prosecutor and was an unauthorized person in the Grand Jury room in violation of Rule 6(d). (Appt's Brief at 139-147)

5. Compare Rochin v. California, 342 U.S. 165 (1952).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	Docket No.
Appellee,	)	81-1345
	)	(Thompson)
vs.	)	81-1346
	)	(Murphy)
FRANK THOMPSON, JR. and JOHN M. MURPHY,	)	
	)	
Appellants.	)	

AFFIDAVIT OF DIRK B. VAN ZAANEN

STATE OF NEW JERSEY)
: ss.:
COUNTY OF ESSEX)

I, DIRK B. VAN ZAANEN, being duly sworn according to law, upon oath depose and say:

1. I am an audio/visual engineer, having been trained for four years at N.R.I., Phillips N.V. (the Netherlands). I am currently the Director of the Audio

Visual Center of Rutgers University-Newark.

2. I have examined Video Tape Q33 of a conversation on October 9, 1979, between Anthony Amoroso, Howard Criden and Frank Thompson, Jr. It has been explained to me that this tape was introduced into evidence as government exhibit 7B5 in the trial of United States of America v. Frank Thompson, Jr. With use of a Compressor Limiter D.B.X. 163 adj.-8dB, a Graphic Equalizer Tapco 2200 adj.-15dB, 0-240-H2 and 15dB-7680-20.000 H2, and a TDK Cassette A.V. 60 standard Eq. and Bias, I copied the audio portion of Tape Q33, time code 19.03.09 to 19.03.11, eliminating the background noise without affecting the voice frequency spectrum. The tape

was not stopped, restarted, cut, spliced, or edited in any way.

3. Time portion coded 19.03.09 to 19.03.11 of video tape Q33 clearly states "You look at that for me, will you."

4. I have read the above and it is true to the best of my information and belief.

S/ Dirk B. Van Zaanen
DIRK B. VAN ZAANEN

SWORN TO and SUBSCRIBED
Before me this 22 day
of September, 1982.

S/ Frank Askin

Attorney at Law, State of
New Jersey

Office-Supreme Court, U.S.
FILED
MAY 12 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1183, 82-1187, 82-1199, 82-1240, and 82-1255

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government must have probable cause to suspect a member of Congress of a crime, or of a predisposition to commit a crime, before it conducts an investigation of him and videotapes his meetings with undercover agents.

2. Whether the Due Process Clause barred petitioners' convictions for offenses relating to bribery because the unlawful payments were offered by undercover government investigators, because a government informant allegedly urged certain petitioners to be as explicit as possible in stating what they would do in return for the illegal payments, or because the informant allegedly engaged in misconduct that did not prejudice petitioners.

3. Whether the government improperly concealed exculpatory evidence, so that certain petitioners' convictions should be reversed.

4. Whether a ready response to an undercover agent's offer of an illegal payment can be sufficient to establish predisposition, and thereby defeat petitioner Lederer's entrapment defense.

5. Whether petitioner Murphy's conviction should be reversed because of error in the supplemental instruction given to the jury.

6. Whether the district court gave too unfavorable an instruction on petitioner Thompson's credibility as a witness at his own trial.

7. Whether evidence of a meeting between petitioner Myers and undercover agents, occurring after the illegal payment was made to petitioner Myers, was improperly admitted.

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-83a)[1] is reported at 692 F.2d 823. The opinion of the district court (Pet. App. 84a-249a) is reported at 527 F. Supp. 1206. The opinion of the court of appeals on an interlocutory appeal by petitioner Myers (Pet. App. 250a-272a) is reported at 635 F.2d 932. The opinion of the court of appeals on an interlocutory appeal by petitioners Murphy and Thompson (Pet. App. 273a-282a) is reported at 642 F.2d 699.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. The petitions for rehearing were denied on November 17, 1982. The petitions for a writ of certiorari in Nos. 82-1183, 82-1187 and 82-1199 were filed on January 14, 1983; the petitions in Nos. 82-1240 and 82-1255 were filed on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

Petitioners were convicted, in three jury trials in the United States District Court for the Eastern District of New York, of offenses arising out of what is known as the Abscam investigation.

1. In the course of this investigation, Melvin Weinberg, an FBI informant, acted as the representative of a fictitious organization supposedly backed by two wealthy Arab sheiks seeking to invest their money in the United States. Petitioner Errichetti, the mayor of Camden, New Jersey, and a New Jersey state senator, contacted Weinberg in connection with investments in casinos then being built in Atlantic City, New Jersey. The district court found that "Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit

[1] "Pet. App." references are to the appendix to the petition in No. 82-1199.

securities, as well as intimate knowledge of which members of the New Jersey legislature could be [bo]ught." Pet. App. 93a-94a.

At one meeting Errichetti, Weinberg, FBI undercover agent Amoroso, who was also posing as a representative of the sheiks, and petitioner Criden, an attorney brought to the undercover agents by Errichetti, discussed problems that might arise if a revolution occurred in the sheiks' country and they wanted to seek asylum in the United States.[2] As the district court found, "[i]mmediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf." Pet. App. 95a.

Specifically, Criden told his law partners, petitioner Johanson and Ellis Cook (who testified for the government under a grant of immunity), that if they arranged meetings between Congressmen and the sheiks or their representatives, $100,000 would be paid to each Congressman and shared with the person who arranged the meeting. Johanson then contacted petitioner Myers, who was a member of the House of Representatives. Myers and Errichetti met with Weinberg and Amoroso in a hotel room; the FBI recorded the meeting on videotape. Pet. App. 16a-17a.[3] The court of appeals described the meeting as follows (*id.* at 17a):

> Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his [earlier] conversation * * * with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of matter, first of all, is private bills that

[2] Errichetti and Criden travelled to Florida for this meeting. Pet. App. 94a-95a.

[3] This meeting was held at Kennedy Airport, in the Eastern District of New York. Petitioners travelled from New Jersey and Pennsylvania to attend. Pet. App. 17a.

> can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

The money in the envelope was divided among Myers (who received $15,000), Errichetti (who received $15,000), Criden, Johanson, and Cook. At a subsequent meeting among Myers, Criden, and two other undercover agents who were posing as representatives of the sheiks, Myers complained about the small size of his payment. *Id.* at 18a.

Myers, Errichetti, Criden, and Johanson were each indicted on three counts: conspiracy to defraud the United States and to violate 18 U.S.C. 201, which prohibits bribery of public officials, in violation of 18 U.S.C. 371; bribery and aiding and abetting bribery, in violation of 18 U.S.C. 201 and 2; and travelling in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[4] They were tried together,

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[4] Petitioner Myers unsuccessfully moved to dismiss the indictment, then appealed the denial of that motion. The court of appeals rejected, on the merits, his claims: that 18 U.S.C. 201 violates the Speech or Debate Clause of the Constitution, Article I, Section 6, Clause 2 (Pet. App. 258a, citing *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966)); that his indictment was invalid because it alleged an agreement to perform a legislative act in return for a bribe (Pet. App. 259a, citing *United States* v. *Brewster*, *supra*); that Congress, acting under its Article I, Section 5, Clause 2 power to "punish its

and Myers, the only one of the four to testify, explained that he was only "playacting"; that is, "Myers * * * claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the [first] meeting what he should say to impress the sheik's representatives. Myers claimed that he did not intend to fulfill any of the promises he made at the meeting." Pet. App. 19a. Over the government's objection, the district court instructed the jury that it should convict only if it found that Myers was not "playacting." *Ibid.* All of the defendants were convicted on all counts.[5]

2. Petitioner Lederer, another member of Congress, was also contacted by Johanson. According to Cook's testimony, Johanson said that he had explained the sheiks' feared immigration problems to Lederer and had told Lederer that the sheiks' representatives insisted that the Congressman accept the money personally, presumably in order to ensure that he would be obligated to the sheiks. Lederer and Errichetti met in a hotel room at Kennedy Airport with Weinberg and Amoroso; this meeting was also recorded on videotape. Pet. App. 19a. The

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Members for disorderly Behavior," has exclusive jurisdiction to punish bribery (Pet. App. 260a, citing *United States* v. *Brewster*, *supra*, and *Burton* v. *United States*, 202 U.S. 344, 367 (1906)); that Section 201 should not be interpreted to permit prosecutions growing out of undercover investigations like Abscam (Pet. App. 262a-267a); that Section 201 did not reach Myers' alleged conduct because the subject of the legislative act he promised to take was fictitious (*id.* at 267a-268a, citing *United States* v. *Brewster*, *supra*, 408 U.S. at 526-527); and that some level of suspicion, such as probable cause, should have been required before he was investigated (Pet. App. 269a-270a). This Court denied certiorari. 449 U.S. 956 (1980).

[5] Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 9a.

court of appeals described this meeting as follows (*id.* at 19a-20a):

> Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . .?" * * * At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

Criden distributed this money, giving Cook an envelope containing $5,000 marked "RL" (for petitioner Lederer), and telling Cook that Errichetti had taken $20,000 and Criden and Johanson $15,500. Johanson subsequently passed the $5,000 to Lederer. Approximately five months later, FBI agents interviewed Lederer about the meeting; Lederer denied that Errichetti was present, denied that private immigration bills had been discussed, and denied that he had received a package or a brown paper bag. Pet. App. 20a.

Lederer, Errichetti, Johanson, and Criden were each indicted on four counts. Three paralleled the counts of the Myers indictment; the fourth charged that Lederer, aided and abetted by the others, received an illegal gratuity in violation of 18 U.S.C. 201(g). Errichetti, Johanson, and Criden were severed after they were convicted in the Myers prosecution. At trial, Lederer acknowledged that he had received $5,000 of the $50,000 handed him by Amoroso. His only defense was that he had been entrapped. He was convicted on all counts and sentenced to three years' imprisonment and fines totalling $20,000. Pet. App. 9a-10a.

3. Petitioner Thompson, then a Representative from New Jersey, was introduced to Criden by Joseph Silvestri, a New Jersey businessman, after Criden asked Silvestri

about Congressmen who would be willing to meet with the sheiks' representatives. Criden told Weinberg that Thompson had agreed to cooperate and would meet with Weinberg and Amoroso. At approximately the same time, Criden also explained to Cook, his law partner, that arrangements had been made so that Thompson would not have to accept the money personally. Thompson, Criden, Weinberg, and Amoroso held a videotaped meeting on October 9, 1979, to discuss private immigration bills and their usefulness in delaying deportation. When Amoroso mentioned money, Thompson insisted that he was not interested in receiving money but continued to give assurances that he would do whatever he could to help the sheiks. The meeting ended with no money having been exchanged. Pet. App. 21a.

Later in the same day, Criden alone returned for another meeting with Weinberg and Amoroso. The court of appeals described this videotaped meeting (Pet. App. 21a-22a):

> Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

In the evening of that same day, Thompson and Criden met again with Amoroso. Criden said "Frank [Thompson] understands the situation." Amoroso replied, "There's the briefcase" and pointed to a briefcase containing $50,000 in cash. Thompson then said to Criden either "You look after that for me will you?" or "You look at that for me will you?"; the tape is indistinct. Pet. App. 22a; see *id.*

at 2a. The discussion turned to investments, and Thompson said that investments by the sheik in his district "would put him in a position to justify his support of the sheik." *Id.* at 22a. At another point, Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." *Ibid.* At the end of the meeting, both Thompson and Criden momentarily lifted the briefcase, and Criden carried it away. Criden subsequently reported to Cook that Thompson had taken $20,000 of the money. *Ibid.*

During the meeting on the evening of October 9, Thompson said he might send his "pal," petitioner Murphy, a Congressman from New York, to meet with the sheiks' representatives. Pet. App. 22a. Thompson then met with Murphy and arranged for him to meet Criden, and on October 20, 1979, Murphy and Criden met Weinberg and Amoroso at a videotaped meeting,[6] which the court of appeals described as follows (*id.* at 23a):

> The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered,

[6] This meeting was also held at Kennedy Airport, and the money was taken to New Jersey and Pennsylvania to be distributed. Pet. App. 23a-24a.

> "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard [Criden] why don't you take care of that."

The court of appeals also stated that the jury could have concluded that Murphy said "Howard why don't you take care of that for me?" *Id.* at 23a n.6.

Criden later told Cook that Thompson was to be given $25,000 of this money, of which $15,000 was Murphy's share; Thompson telephoned Criden and arranged a meeting, and after the meeting Criden told Cook he had delivered the money to Thompson. When questioned by FBI agents about his meetings with Weinberg and Amoroso, Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase. Pet. App. 24a, 25a.[7]

Subsequently, Amoroso took Murphy aside at another videotaped meeting described by the court of appeals (Pet. App. 25a):

> In this conversation Murphy acknowledged the dangers of speaking about money * * *. Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like

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[7] Subsequent events involving Representative John Murtha of Pennsylvania, who received no money and was not indicted, are also relevant to the Thompson and Murphy prosecutions. Thompson gave Murtha's name to Criden and suggested that Murtha was a candidate to meet with the sheiks' representatives. Murtha testified at trial that Thompson had told him, in conversations on the House floor, "that there would be $50,000 in 'walking around money' for Congressmen willing to help" wealthy Arabs who might need assistance on immigration matters. Thompson also told Murtha that he had enlisted Murphy in the enterprise. Pet. App. 24a.

> that . . . Particularly Thompson, myself, or Murtha.[8] We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik.

Thompson and Murphy were indicted (together with Criden and Silvestri, who were subsequently severed) on five counts—bribery, conspiracy, and interstate travel charges paralleling those of the Myers indictment; an unlawful conflict of interest, consisting of the receipt of money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in an immigration matter involving foreign nationals, in violation of 18 U.S.C. 203(a); and receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g). Pet. App. 10a-11a.[9] The basis of the substantive charges against Thompson was his receipt of money exchanged at the October 20 meeting; the October 9 meeting was used as evidence of the conspiracy.

Thompson testified in his own behalf and denied receiving any money. Pet App. 25a. Murphy neither testified nor called any witnesses; his defense, argued in summation, was that he had not received any money. *Id.* at 25a-26a. The interstate travel count was dismissed by the district court. Thompson was convicted of conspiracy, bribery, and receipt of an unlawful gratuity; he was acquitted of unlawful conflict of interest. Murphy was convicted of conspiracy, conflict of interest, and receipt of

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[8] See page 9 note 7, *supra*.

[9] Petitioners Thompson and Murphy took an interlocutory appeal from the denial of their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 273a-282a), holding that their claims were controlled by its holdings on petitioner Myers' interlocutory appeal. See pages 4-5 note 4, *supra*.

an unlawful gratuity; he was acquitted of bribery. Pet. App. 11a.[10]

4. After the trial and before sentencing, the district court conducted a 16-day hearing to consider claims by all seven petitioners that their convictions should be overturned and the indictments dismissed because of various forms of government misconduct and errors at the trial. The court permitted petitioners to rely on evidence developed in other trials that grew out of the Abscam investigation. The district court denied relief, writing a comprehensive opinion. Pet. App. 84a-249a. Petitioners appealed from their convictions, and the court of appeals, also writing a comprehensive opinion, unanimously affirmed all the convictions except for petitioner Murphy's conviction of unlawful conflict of interest, which it reversed and remanded for a new trial. *Id.* at 5a-83a.

ARGUMENT

Most of the petitioners raise, in some form, two contentions applicable to the Abscam investigation generally —that it should not have been conducted without probable cause to believe that the members of Congress to whom payments were offered were guilty of, or predisposed to commit, related offenses; and that the level of government involvement violated the Due Process Clause. These contentions are without foundation in the law. Petitioners also "voice a chorus of indignation" concerning informant Weinberg (Pet. App. 50a), but they fail to show that any of their claims about Weinberg entitle them to relief. Finally, petitioners make a variety of contentions bearing on their particular cases, many of which are

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[10] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 11a. The effect of the court of appeals' reversal of his conviction on the conflict of interest charge (see page 11, *infra*) was to reduce his aggregate fine by $10,000. Pet. App. 83a n.37. Thompson was tentatively sentenced to the maximum terms, as required by 18 U.S.C. 4205(c) to permit further evaluation of his medical condition. Pet. App. 11a.

plainly insubstantial and all of which are of insufficient importance to warrant this Court's review.

1. Several petitioners, and amicus curiae American Civil Liberties Union, contend that the government should not be permitted to investigate members of Congress unless the government already has probable cause to believe that they have committed or are predisposed to commit the offense under investigation. See 82-1183 Pet. 9-14; 82-1199 Pet. 20-44; 82-1255 Pet. 24-27, 49-56; ACLU Am. Br. 6-7. See also 82-1240 Pet. 20-21.

We note at the outset that the government did not engage in random investigations of petitioners; each of the petitioners either approached the undercover agents of his own accord or was introduced as a person willing to engage in corrupt activities by another person who had shown his willingness to do so. See Pet. App. 27a n.7, 149a-150a. More important, however, petitioners do not suggest, and cannot suggest, that the decisions of this Court or the language of the Constitution requires that the government have any level of suspicion—much less probable cause—before undertaking an investigation of the kind at issue here. Whether petitioners' proposed restrictions on criminal investigations are desirable as a matter of policy is a question that belongs to the domain of legislation, not constitutional adjudication.

Probable cause is required only for a search or a seizure, and the videotaped investigation of petitioners did not constitute a search or a seizure. *Hoffa* v. *United States*, 385 U.S. 293 (1966), and *United States* v. *White*, 401 U.S. 745 (1971), establish that one party to a conversation may record it without invading any constitutionally protected interest of the other parties, and petitioners identify nothing in the logic of *Hoffa* or *White* suggesting that a different result should obtain when audio recording is supplemented by video recording—which can only result in a more accurate record of the events at issue. See, *e.g.*, *United States* v. *White*, *supra*, 401 U.S. at 751-753 (plurality opinion) ("If the conduct and revelations

of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking * * *. [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.").[11]

Similarly, except for one insubstantial contention by petitioner Lederer,[12] petitioners do not assert that they

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[11] Petitioner Thompson asserts (82-1199 Pet. 35-36) that in *White* the government had probable cause to believe that the defendant would engage in criminal conduct during the recorded conversation. But the Court in *White* never referred to the existence of probable cause, and the clear holding of that case is that probable cause is unnecessary.

[12] Petitioner Lederer asserts (82-1183 Pet. 22-23) that the Speech or Debate Clause precluded the government from introducing into evidence a financial disclosure statement he had filed as required by House rules. As the court of appeals explained, however (Pet. App. 58a), this statement was in no sense a contribution to a legislative debate or to any other form of legislative activity; it plainly does not fit within this Court's definition of legislative acts. See page 14, *infra*. Petitioner Lederer's only argument to the contrary is that because establishing rules like that requiring the disclosure statement "is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause." 82-1183 Pet. 23. This is a non sequitur; nothing in the Constitution suggests that everything done pursuant to the internal rules of the House is "Speech or Debate." "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. * * * The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions" (*United States* v. *Brewster*, 408 U.S. 501, 515, 528 (1972) (emphasis in original)). Nor does that Clause protect all actions performed by members of Congress "in their official capacity" (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)).

Indeed, petitioner Lederer concedes (82-1183 Pet. 23) that he could be punished for filing a false disclosure statement; this would

are being prosecuted for activities that fall within the ambit of the Speech or Debate Clause. That Clause protects only "legislative acts," and as the Court has specifically stated (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

It is entirely clear that petitioners' dealings with the undercover agents were not legislative acts; they were, at most, contacts with possible constituents, and the Court has explicitly rejected the suggestion that " 'errands' performed for constituents [or] the making of appointments with Government agencies" are legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In light of these settled principles, petitioners do not seriously contend that the acts for which they were prosecuted are themselves protected by the Speech or Debate Clause.

Instead, petitioners appear to assert that although the Abscam investigation and prosecution violated no identifiable constitutional provision, the combination of videotaping and the fact that some of the targets were members of Congress somehow made the investigation offen-

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not be so if such statements truly fell within the Speech or Debate Clause. We note that it is well established that members of Congress can be prosecuted for making false statements to agencies of the House of Representatives. See, *e.g.*, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (false statements to House Disbursing Office); *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (false statements to House Office of Finance).

sive to constitutional values.[13] Petitioners cite no case supporting this contention, however. The only argument they advance is that any other result would create an unacceptable danger that the executive branch will harass or intimidate members of Congress for political reasons. See 82-1183 Pet. 12-13; 82-1199 Pet. 22-23; 82-1255 Pet. 25, 52-53.

We do not dispute that politically motivated investigations are improper. But petitioners do not point to, and no court has found, the slightest evidence that the investigation of petitioners was politically motivated. As the court of appeals stated, the suggestion that "the Government targeted the defendant Congressman for political or other impermissible reasons * * * is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved [here] * * *. Criden and Johanson selected Congressmen

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[13] Petitioner Murphy makes a somewhat related argument that purports to rest on the First Amendment but is in fact a challenge to the sufficiency of the evidence against him. 82-1187 Pet. 13-18. Petitioner Murphy does not contend that the act of which the jury found him guilty—"directly or indirectly ask[ing], demand[ing], exact[ing], solicit[ing], seek[ing], accept[ing], or receiv[ing], or agree[ing] to receive anything of value for himself for or because of any official act performed or to be performed by him" (18 U.S.C. 201(g))—is protected by the First Amendment. Instead, he claims that his guilt was "inferred from constitutionally protected activity" (81-1187 Pet. 14; see *id.* at 15, 16 n.15). But it is entirely permissible, and indeed commonplace, to use constitutionally protected speech as *evidence* of an element—usually a mental element—of an offense. To give an obvious example, expressions of personal animosity toward another are ordinarily protected by the First Amendment, but they can of course be used as evidence that the speaker intended to harm the person of whom he spoke.

Petitioner Murphy's First Amendment claim in fact dissolves into a contention that there was insufficient evidence of his guilt. See 82-1187 Pet. 15, 17-18. But there was abundant evidence of Murphy's guilt: for example, the references to money at the meeting, which the jury could view on videotape; the secretive way in which the payment was made, which the jury again saw; the evidence that Murphy had been briefed; and his "coy" videotaped discussion with Amoroso about the virtues of being discreet.

Myers and Lederer. Silvestri selected Congressm[a]n Thompson. Thompson selected Congressman Murphy." Pet. App. 27a n.7. Petitioners also do not explain why the danger of politically motivated investigations requires that *all* prosecutions of members of Congress resulting from investigations initiated without probable cause be barred; in any other case involving a claim that a prosecutorial decision was motivated by an impermissible purpose (see, *e.g.*, *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982); *Oyler* v. *Boles*, 368 U.S. 448 (1962)), the courts would determine in a particular case, relying on rebuttable presumptions if appropriate, whether the action was improperly motivated. Moreover, videotaping would seem to reduce the threat of politically motivated investigations, by eliminating so far as possible the danger that an investigator will misunderstand or distort a target's responses.

In any event, if politically motivated *investigations* violate the Constitution, barring a *prosecution* is an irrational remedy for the violation. On petitioners' own hypothesis, the danger is that the executive branch will conduct such an investigation not in order to institute a criminal prosecution through lawful means, but in order to collect information of lawful but embarrassing acts or statements by members of Congress. Prohibiting a prosecution would, therefore, be unlikely to deter an investigation of the kind petitioners fear; such an investigation could still purport to be concerned with others associated with the member of Congress, or with civil wrongs. Indeed, the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct.[14] See also *United States* v. *Brewster*,

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[14] As the court of appeals pointed out when it considered Myers' interlocutory appeal (Pet. App. 263a): "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'No.' Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that

supra, 408 U.S. at 524-525 ("[F]inancial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.").

In our view, there was nothing repugnant to constitutional values in the conduct of the Abscam investigation. The government did not tape meetings between members of Congress and their families or their close personal or political associates; it taped meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it. The values of a democratic society will not be disserved if members of Congress are put on notice that, if the other parties to the meeting so desire, the members' conduct at such meetings may some day be reported, in the most accurate possible form, to the public.

2. Only petitioner Lederer claimed at trial that he was entrapped. Pet. App. 28a.[15] But several petitioners contend that the conduct of the investigation was so outrageous that their convictions must be reversed. See 82-1183 Pet. 15-19; 82-1189 Pet. 45-57; 82-1240 Pet. 13-21; 82-1255 Pet. 31-49. This contention relies on the suggestion made by some of the Justices in *Hampton* v. *United States*, 425 U.S. 484 (1976), that even if a defendant is not entrapped, government involvement in a

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the Executive Branch would successfully use these tactics for political reprisal." The court of appeals further noted (*id.* at 263a-264a) that there is no reason to doubt Congress's ability to recognize any dangers of politically motivated investigations and to take appropriate legislative action. "Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant." *Ibid.*

[15] We discuss the arguments raised by petitioner Lederer in connection with his entrapment defense at pages 26-28, *infra*.

crime may reach such a level that the Due Process Clause may bar a conviction. Petitioners' principal argument in support of this contention is that the government "created" the crimes for which they were convicted rather than "detecting" independently-existing criminal conduct. See, *e.g.*, 82-1199 Pet. 19, 50; 82-1255 Pet. 34, 39-47. Petitioners also assert that the allegedly unsavory background and conduct of FBI informant Weinberg somehow caused the investigation to violate due process (*e.g.*, 82-1240 Pet. 13-21; 82-1255 Pet. 32) and that the inducements they were offered were too large (*e.g.*, 82-1255 Pet. 32, 36-37).

a. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, *supra*; *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). As the court of appeals explained, that is all the government did here (Pet. App. 32a; footnote omitted):

> Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so. Whatever may be the due process limit of governmental participation in crime, it was not reached here.

The essence of due process is "fundamental fairness" (*Hampton* v. *United States*, *supra*, 425 U.S. at 492 (Powell, J., concurring)), and there is no discernible sense in which the government's role in this investigation resulted in petitioners' being treated unfairly. The investigation did no more than replicate circumstances in which a public offiical might find himself; there was no

possibility that the investigation would incriminate a public official who was not susceptible to accepting illegal payments. As the district court remarked "each [petitioner] was a willing volunteer seeking illegal and corrupt payments." Pet. App. 152a. Nor was this a case in which it might be said that the defendants were no more than minor actors in a government-operated criminal enterprise (cf. *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978)); petitioners were central figures whose refusal to engage in illegal conduct would have caused this aspect of the Abscam operation to collapse.[16]

Moreover, whatever the importance to society of exposing persons to various temptations to engage in other kinds of unlawful activity (cf. *Hampton*, 425 U.S. at 498 (Brennan, J., dissenting); *United States* v. *Twigg*, *supra*), there is a clear and important interest in exposing public officials who will accept bribes. It is surely reasonable to assume that officials will on occasion be offered illegal payments of the kind involved in this case (cf. *Hampton*, 425 U.S. at 496 n.1 (Brennan, J., dissenting) ("a reasonable * * * inquiry might be whether the accused would have obtained the contraband from a source other than the Government"); the crafty behavior of petitioners Thompson and Murphy indeed appears to be evidence that such schemes are not uncommon. At the same time, it is exceedingly difficult to discover a bribery-related offense except through undercover investigation of some form, because all of those with knowledge of the offense have a strong interest in concealing it. See Pet. App. 263a.[17] In addition, as we have noted, petitioners were not selected at random; they came to the undercover

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[16] *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)—an Abscam case—makes untenable any suggestion of a conflict between *Twigg* and the instant decision of the court of appeals.

[17] Congress itself recognized this point in its report on an investigation into alleged efforts by representatives of the Republic of Korea to buy influence. See H.R. Rep. No. 95-1817, 95th Cong., 2d Sess. 93-94 (1978).

agents through contacts that are presumably very similar to those that would be developed if an actual wealthy potential immigrant were seeking to buy influence. And as both courts below noted (Pet. App. 262a n.7, 161a-162a), petitioners' culpable acts were videotaped from start to finish so that they could be brought before the jury in the most complete and accurate fashion possible, not subject to the interpretations of the undercover agents or to contests over credibility. In these circumstances, there is no basis for concluding that the investigation transgressed the Due Process Clause.[18]

b. Petitioners Myers, Errichetti, Johanson, and Criden also argue that the government violated the Due Process Clause in its use of informant Weinberg. See 82-1255 Pet. 31-49; 82-1240 Pet. 13-21. (Petitioner Criden makes a similar argument about petitioner Errichetti. 82-1240

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[18] The court of appeals also disposed correctly of petitioners' suggestion that the inducements were so great that they violated due process. As it noted, these contentions appear to refer not to the $50,000 bribes, but to the large investments the sheiks proposed to make; and as the court explained (Pet. App. 33a):

> We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. * * * [Moreover,] the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

In addition, the district court specifically found, in the cases of Errichetti and Criden, "no evidence to connect their motivations for these crimes with their hoped-for bonanzas if the casino project went ahead." Pet. App. 153a.

Pet. 15.) But while petitioners detail Weinberg's alleged misdeeds at some length, they fail to show—and often do not even attempt to show—that these actions amounted to a violation of petitioners' rights.[19]

For the most part, the thrust of petitioners' argument seems to be that the Due Process Clause was violated by the mere "use of a personage such as Weinberg at all to 'sting' United States Congressmen" (82-1255 Pet. 32). Even accepting petitioners' allegations about Weinberg's character and conduct, it is well established that the government must sometimes use informants with such a background; indeed, as the district court explained (Pet. App. 179a), often the authorities use an informant precisely because they hope that a careful and sophisticated criminal, who would sense (or learn, upon investigating) the inauthenticity of an undercover law enforcement officer, might regard the informant as a genuine fellow criminal. For this reason, it is not enough for petitioners to assert that Weinberg was paid by the FBI,[20] or that Weinberg frequently acted in ways characteristic of a criminal.

Nor are petitioners entitled to immunity from prosecution on the basis of their assertions that Weinberg's supervision was inadequate. See, *e.g.*, 82-1255 Pet. 32. The district court specifically found that "the supervision imposed on Weinberg was more than adequate to the circumstances of this investigation." Pet. App. 164a. Even apart from this finding, petitioners attempt to make a serious showing of prejudice in connection with only one series of actions by Weinberg—his so-called "coaching" of petitioner Myers. This "coaching" consisted, according to petitioners, of telling Myers two things: that he should

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[19] See Pet. App. 198-199a ("Throughout these trials, defense counsel sought to make Weinberg's character and activities the key issue before the juries, thus distracting from the conduct and motivations of the defendants. These issues were unsuccessful 'red herrings' at the trials, and they are 'red herrings' still.").

[20] We note that Weinberg was not paid on a contingent fee basis. Pet. App. 51a.

be vigorous in insisting to the sheiks' representatives that he had the power to help the sheiks and would use it; and that he need not actually fulfill his promise. Petitioners also urge that similar "coaching" of Senator Harrison Williams, a defendant in another Abscam prosecution whose case is not before this Court, is also relevant.

i. The first alleged element of the "coaching" consisted simply in urging the suspects to make their representations of what they were willing to do in return for cash as explicit as possible. In many ways, this made the investigation more, not less, fair to the suspects. Indeed, petitioner Murphy criticizes the government for not taking steps to obtain more unequivocal evidence of his guilt. 82-1187 Pet. 18-22.[21] A public official who was unsure about the reason he was being offered money, or who was reluctant to sell his influence, would, when told that he should boast about his power in order to obtain a payment, surely should have demurred and refused to par-

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[21] Petitioner Murphy's argument on this point is essentially that "[g]iven the simple purpose of the October 20 meeting * * * and the agents' complete control over the events," any ambiguities in the videotaped dealings should be strictly interpreted against the government's version of the events. 82-1187 Pet. 20. But as the court of appeals pointed out (Pet. App. 46a), "[u]ndercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, 'Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action.'" See also Pet. App. 246a-247a n.17 (during another Abscam investigation, petitioner Errichetti criticized an undercover agent for being insufficiently subtle in offering a bribe to an official). This is precisely the kind of issue one would have expected petitioner Murphy to raise forcefully before the jury, and there is no reason to second-guess the jury's resolution of it.

In any event, the government did not have "complete control" of the events; it videotaped them, but government agents were only some of the parties to the conversations. We also note that after Thompson insisted that the sheik's representatives be more subtle, it was surely reasonable for the agents to believe that Thompson's "pal," Murphy, who was brought to them by Thompson, would want to operate under a similar arrangement.

ticipate further in the scheme. As the court of appeals concluded (Pet. App. 44a):

> Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States* v. *Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). Whatever conduct might transgress the [Due Process Clause], * * * the facts of the Abscam investigation are not even close to the line. * * * [T]he record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

ii. As the court of appeals also explained, it is far from clear that the other alleged form of "coaching"—telling petitioner Myers that he need not fulfill the promise he would make in return for the $50,000—was practiced in this case. See Pet. App. 34a-38a. But even assuming that it was, petitioners fail to show how such "coaching" could violate the Due Process Clause. Surely it did not place pressure on Myers to commit the offense; while it may have made the corrupt agreement more attractive to Myers because it suggested that he would not have to uphold his part of the bargain, that is scarcely the kind of inducement that might raise a question under the Due Process Clause. Indeed, the proposal that Myers take the sheik's money and then not fulfill his promise added an element of fraud beyond a simple exchange of influence for cash and should have been at least equally repulsive to an honest official.

Although petitioner Myers now contends only that the coaching violated the Due Process Clause, and does not

contend that it draws into question his guilt under the bribery statute, 18 U.S.C. 201(e), we note that the court of appeals considered and rejected the latter contention. First, as the court explained, the district judge accepted, for purposes of the trial, the contention that it would be a defense to a charge of bribery to show that the official who accepted the money had no intention of carrying out the agreement (Pet. App. 34a-35a):

> Judge Pratt * * * afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. * * * The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. * * * An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.
>
> Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

In addition, the court of appeals concluded, after examining the language and legislative history of 18 U.S.C. 201(c), that "[w]ith respect to the bribery statute, * * * the defense of fraud is * * * unavailable. If Myers was 'playacting' and giving false promises of assistance to

people he believed were offering him money to influence his official actions, he violated the bribery statute." Pet. App. 42a-43a. We can think of no reason that Congress might have had for immunizing public officials who accept what would be a bribe but who know that they are defrauding the bribe-payer as well as the public. See also *United States* v. *Hood*, 343 U.S. 148, 151 (1952) (in construing a statute related to Section 201(c), "[w]hether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption").

3. Petitioners Thompson and Criden claim that the prosecution improperly concealed exculpatory evidence. See 82-1240 Pet. 21-25; 82-1199 Pet. 62-65. Petitioner Criden's allegations concern only informant Weinberg; he claims that the jury was denied the opportunity "to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation" (82-1240 Pet. 25). The district court (Pet. App. 93-98) and the court of appeals (*id.* at 52a-53a) considered these claims in detail and rejected them, showing that the petitioners were not deprived of any material information bearing on Weinberg's credibility. In addition, as both courts below noted, petitioners had ample opportunity to impeach Weinberg's credibility (*id.* at 52a, quoting *id.* at 230a-231a):

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

Moreover, as the district judge, who presided at the trials, explained, these cases simply did not turn on Weinberg's credibility. Pet. App. 229a. To the extent the defendants raised serious factual issues at all, those issues concerned the interpretation of allegedly ambiguous acts and

statements made by petitioners. The jury was able to resolve these ambiguities by themselves viewing the acts and listening to the statements, which the government had recorded, and petitioners fail to show how the additional evidence that they assert the government should have uncovered and revealed would have helped them persuade the jury on the questions that were central to the case. Petitioner Criden's principal argument, for example, appears to be only that the additional evidence would have persuaded the jury "to reject Weinberg's denial that he orchestrated a charade in the *Myers* case" (82-1240 Pet. 22); but as we have explained, demonstrating the existence of a "charade" would not have been a defense.

Petitioner Thompson's claim (82-1199 Pet. 62-63) is that the government improperly concealed the "immunity" granted to Congressman Murtha, who testified against him (see page 9 note 7, *supra*). But not only was no immunity granted to Congressman Murtha; the question whether the likelihood of his being prosecuted would affect his credibility was fully aired at trial. The parties stipulated at trial that the government had "no present intention of prosecuting Congressman Murtha" (Tr. 2783),[22] and that stipulation was read to the jury. Petitioner Thompson's counsel stated that that stipulation was "fully acceptable on behalf of Mr. Thompson" (*ibid.*). The district judge, when he instructed the jury, reminded them of this stipulation and warned that Congressman Murtha's testimony should be considered "carefully" (Tr. 3081).

4. Petitioner Lederer, the only one of the petitioners who requested an entrapment instruction, appears to claim (82-1183 Pet. 19-22) that the government introduced insufficient evidence of his predisposition to commit the offenses charged. As the district court and the court of appeals explained, Lederer's prompt response to the offer of a bribe—his "ready complaisance" as Judge

[22] We rely on the brief filed by the United States Attorney in the court of appeals for citations to the transcript.

Learned Hand termed it (*United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933), quoted at Pet. App. 207a)—was ample evidence of predisposition:

> In seeking only $5,000 for himself out of the $50,000 he received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement." The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

Pet. App. 29a-30a; citations omitted. See *id.* at 207a-208a.

Petitioner Lederer appears to urge (82-1183 Pet. 20-21) that only past evidence of criminal activity and not just an eager response to a government offer can possibly establish predisposition, but he fails to cite anything in an opinion of this Court, or in logic, that supports such a rule. Nor, contrary to the heading in his petition (*id.* at 19), does he cite any decision of a lower federal court that has embraced such a rule; on the contrary, courts have consistently rejected it. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) (citing cases).

Petitioner Lederer also urges (82-1183 Pet. 24-25) that this Court resolve what he describes as a conflict among the credits on the question whether a defendant must admit the acts charged, in order to have an entrapment defense submitted to the jury. Specifically, petitioner Lederer suggests that he wished to claim both that he was entrapped and that he was receiving only a legal campaign contribution. But the jury in Lederer's case was given an entrapment instruction (Pet. App. 107a); and Lederer never attempted or offered to testify at trial that he was receiving only a campaign contribution (*id.* at 50a & n.20). Nothing in the district court's opinion, the court of appeals' opinion, or the law of the Second

Circuit [23] suggests that Lederer would have been barred from offering both defenses if he had sought to do so; and having not sought to do so at trial, he certainly cannot now invoke a supposed conflict among the circuits on an issue not implicated in his case.

5. Petitioners assert that the courts below committed a number of other errors, but in no instance do they show why these claims raise issues requiring this Court's review. For example, petitioner Murphy's principal contention (82-1187 Pet. 5-13) is that a supplemental instruction given by the district court in response to the jury's written question was incorrect. Since this was not even a standard instruction but one devised by the district court in an effort to clarify the particular matter about which the jury inquired, it is clear that there is no need for this Court to review the court of appeals' decision that the district court did not err.

In any event, petitioner Murphy's highly attenuated argument on this point is insubstantial. The district judge initially instructed the jury: "'It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20 [the date of the meeting among Amoroso, Weinberg, Criden, and Murphy] was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both.'" Pet. App. 62a (emphasis added by the court of appeals). This instruction was given in connection with the bribery charge, but the district court told the jury that it applied to the "re-

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[23] The Second Circuit has permitted a defendant raising an entrapment defense to assert his innocence on other grounds, so long as he "did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *United States* v. *Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980). See also *United States* v. *Mayo*, No. 82-1256 (2d Cir. Apr. 8, 1983), slip op. 2976; *United States* v. *Williams*, No. 82-1111 (2d Cir. Apr. 5, 1983), slip op. 2841-2842 n.5.

ceipt" element of the unlawful gratuity and conflict of interest counts as well. *Ibid.* Petitioner Murphy does not object to this instruction. 82-1187 Pet. 7.

During its deliberations, the jury sent the following inquiry to the judge:

> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.
>
> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*[*"*] receiving the money at some later time?

Pet. App. 63a-64a (emphasis by the jury). After an extended discussion with counsel, the district judge responded to the question. His supplemental instruction, reproduced at 82-1187 Pet. App. 97a-99a, began by reminding the jury that the central question was whether Murphy received the money. The district judge then noted that the jury emphasized "eventually," and said that he interpreted the question to be asking whether the receipt *must* have been "eventually, and not then, October 20th," at the meeting. *Id.* at 98a.

The judge answered this question by saying:

> [M]y answer to you is that in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what all the circumstances were, and determine from that whether the defendant Murphy received the money.

82-1187 Pet. App. 98a. The district judge immediately added that "[i]t is absolutely critical * * * that he would have to know that it was money that was in the briefcase. * * * [C]ertainly if you should find that he did not know that there was money in that briefcase while that was going on, then unquestionably you should find him not guilty on all the substantive charges." *Ibid.* The district judge then summed up: "If you are talking simply about

the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of this money on or shortly after October 20, 1979" (*id.* at 98a-99a). After the jury resumed its deliberations, Murphy's counsel made the single objection that the judge may have left it unclear at one point that the government had the burden of proof; the district court immediately recalled the jury and clarified that point. *Id.* at 99a-101a.

The jury's inquiry referred specifically to count two, charging bribery, on which petitioner Murphy was acquitted. His counsel never requested the district judge to clarify the relationship between the supplemental instruction and the other counts. See Pet. App. 66a n.24.

Moreover, petitioner Murphy does not point to a single sentence of the instruction that misstated the law. It appears that petitioner Murphy would have interpreted the question differently, to be asking about the relationship that had to exist between Criden and Murphy in order to find that Murphy received the money on October 20.[24] Also, petitioner Murphy in retrospect (although he did not so indicate at the time) apparently would not have reemphasized the point that he was not guilty if he did not know the briefcase contained money, although that was a central contention of his defense (see Pet. App. 65a, 67a; 82-1187 Pet. App. 88a). But at least so long as the district judge did not misstate the law, these were plainly matters to be confided to his discretion, subject to the review of the court of appeals. That court found that "Judge Pratt's handling of the episode was admirable under the circumstances." Pet. App. 68a.

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[24] On this point the court of appeals noted (Pet. App. 67a-68a):

> Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given.

b. Petitioner Thompson contends (82-1199 Pet. 58-61) that the district court, although acting in accordance with established Second Circuit precedent, gave too harsh an instruction on his credibility as a witness. Even petitioner Thompson's own account shows that the judge's statement that Thompson, because he was a defendant, had a motive to testify falsely, was immediately balanced by the statement that " 'it by no means follows that he's not capable of telling the truthful, straightforward story' " (*id.* at 59). In addition, the district judge pointed out that the jury should "consider that [a defendant] takes a real risk by taking the stand and subjecting himself to cross-examination" (Tr. 3055).[25] See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973) (invoking "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

The cases cited by petitioner Thompson, far from supporting him, show the incorrectness of his contention. In *Hicks* v. *United States*, 150 U.S. 442, 452 (1893), the Court strongly suggested that an instruction pointing out that a defendant who testified had a motive to lie would *not* be sufficient to warrant the reversal of a conviction. In *Reagan* v. *United States*, 157 U.S. 301 (1895), the Court upheld an instruction that drew the defendant's credibility into question at least as sharply as the district court's charge in this case; immediately after the passage quoted by petitioner Thompson (82-1199 Pet. 60-61), the Court stated (157 U.S. at 310-311):

> On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. * * * [T]he

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[25] See page 26 note 22, *supra*.

court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

In *Taylor* v. *United States*, 390 F.2d 278, 284-285 (8th Cir. 1968), the court carefully distinguished between its holding—that the judge could charge a jury that the defendant had a peculiar interest in testifying falsely—and its suggestion that trial judges might wish to avoid such a charge. *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), followed *Taylor* in both respects.

c. Finally, petitioners Myers, Errichetti, and Johanson challenge (82-1255 Pet. 56-64) the district court's admission of evidence of the videotaped meeting among Myers, Criden, and two FBI undercover agents posing as the sheik's representatives, at which Myers complained about the small size of his share of the $50,000 handed to him at the earlier meeting. Petitioners contend that this evidence should not have been admitted because that meeting occurred after the meeting at which the money was passed and the criminal transaction consummated. But it is entirely clear that Myers' subsequent remarks were relevant, because they "illuminat[ed] the nature of the conspiracy" (Pet. App. 56a) between the sheik's representatives and petitioners. Indeed, as the court of appeals noted (Pet. App. 56a), these conversations were in fact part of the conspiracy charged in the indictment (although the district court, in an excess of caution, instructed the jury otherwise) and were therefore fully admissible on that ground. Moreover, it is far from clear that evidence of an inculpatory *statement* like Myers'—that constitutes only an admission or an explanation of a prior act—is evidence of "other crimes, wrongs, or acts" within the meaning of Fed. R. Evid. 404(b). In any event, that rule, on its face, permits evidence of "other crimes, wrongs, or acts" to be admitted for such purposes as "proof of motive, * * * intent, * * * plan [or] knowl-

edge"; the rule does not distinguish between acts committed prior to the alleged crime and subsequent acts.

Petitioners urge that *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978), stands for the proposition that evidence of subsequent acts may not be used. But the panel in *Boyd* narrowly limited its ruling. It suggested that the subsequent acts evidence was being used only to show bad character; it specifically distinguished several cases that permitted evidence of subsequent acts to be admitted; and it explicitly stated that its holding was not inconsistent with *United States* v. *Laurelli*, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). In *Laurelli*, the court of appeals upheld the admission of evidence of an offer of a bribe that occurred after the bribe attempt for which the defendant was indicted, on the ground that it "tended to show * * * intent" (*id.* at 832). The court also noted that "[w]e have held in a number of cases that evidence of similar acts subsequent to the one being tried is admissible" (*ibid.*). Indeed, Judge Hunter concurred in *Boyd* on the explicit understanding that the court had not held that evidence of subsequent crimes was generally inadmissible. See 595 F.2d at 126-127.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 82-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK THOMPSON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT
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1. Respondents' Brief in Oppcsition mis-states the fundamental issue posed by this case as whether there is a requirement of "probable cause" before the intrusive techniques of ABSCAM may be employed.* Petitioner Thompson has never contended that a "probable cause" standard must control, but only that a minimum threshold of "reasonable suspicion" is necessary before agents of the Executive Branch can lure a member of Congress before its secret cameras and seek to compromise him. Since Respondent concedes it had no "reasonable suspicion" as to Thompson, his conviction should be reversed. Similarly, contrary to Respondents' contention (p. 12), amicus American Civil Liberties Union only asserts

* This inaccurate statement of the issue is included in the Respondents' first Question Presented and in its Argument at pages 11-12.

that intrusive investigative techniques similar to those used in the ABSCAM investigation "cannot be used in the absence of facts or circumstances which reasonably indicate that they will detect criminal activity which is occurring or is likely to occur in the absence of the investigation" and "cannot be used against a specific target in the absence of particularized information linking the target to criminal activity."*

Having misstated the constitutional standard urged by Petitioner and Amicus, Respondent then attempts to equate this probable cause "strawman" with the "presumption of vindictiveness" standard rejected by this Court last term in United States v. Goodwin, ___ U.S. ___, 102 S. Ct. 2485 (1982) (involving discretion of

* Motion for Leave to File Brief Amicus Curiae in Support of Petitioner's Application for a Writ of Certiorari, at 7-8.

prosecutor to upgrade the charge after defendant withdrew a guilty plea). Under the false analogy drawn by Respondent, a so-called "probable cause" requirement would be equivalent to a presumption that executive branch agents have improperly targeted the defendant Congressmen. Instead, Respondent urges an approach, which it claims would appropriately follow Goodwin, requiring a demonstration of improper prosecutorial motive on a case by case basis rather than a prophylactic requirement of prior cause.

Respondent's analogy to the Goodwin situation is preposterous. Goodwin involved the propriety of a prosecutor's conduct toward an already arrested and charged criminal defendant. The issue before the courts was a typical post facto determination of the prosecutor's motivation in upgrading the charge in the context of a closely circumscribed factual history of a specific prosecution. All the facts of that

prosecution were known or easily available to the defendant who objected to the practice. The Court held it was inappropriate to create an evidentiary presumption to facilitate the fact-finding process. Cyler v. Boles, 368 U.S. 448 (1962), also cited by the Respondent, is to the same effect. It involved the exercise of discretion by a specific prosecutor as to whether to apply a recidivist provision to a specific defendant. In such a narrowly circumscribed field for the exercise of official discretion, the possibility of undetected abuse of that discretion is minimal.

The issue posed by the Thompson ABSCAM case, on the other hand, is the constitutional standard which is to govern when executive branch agents entice a suspicion-free member of the legislative branch before hidden cameras and attempt to incriminate him. The context is as far removed from

Goodwin as the decision to investigate is from the decision to charge -- and as removed as the political process is from the criminal-sentencing process. Moreover, the "sting" target's ability to prove prosecutorial motive is dramatically inferior to that of a defendant in an ongoing criminal case. Once indicted and arrested, a defendant is privy to the unfolding and highly structured pre-trial and trial process. The potential "sting" target, on the other hand, is completely unaware of who in the vast universe of government agents and informers is doing what to him and for what reasons and is unlikely to be able to retrace that history sometime in the future if the surreptitious executive branch activities result in actual prosecution. Still worse, the target whom the executive branch fails to corrupt (or charge with corruption) may never know in what ways his privacy was invaded and his integrity compromised -- or

may only find out when some embarrassing (although not incriminating) material gathered in the course of that investigation surfaces.

The correct measure of official discretion to lure legislators into compromising acts before secret cameras must be determined not by the need for an evidentiary presumption concerning prosecutorial motive, but by the need to protect the sanctity of the political/legislative process (see Petition, at 25-45) as well as the privacy of the individual by forbidding "unfettered governmental intrusion." Delaware v. Prouse, 440 U.S. 648, 663 (1979).

As this Court has again recently reminded us, "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty." Kolender v. Lawson, 51 U.S.L.W. 4532, 4533 (May 2, 1983). That framework requires minimal guidelines to govern law enforcement which prohibit police

and prosecutors from "pursuing their personal predilections." Id. at 4534. That framework cannot tolerate a discretion in police agencies to engage in ABSCAM-type "stings" against suspicion-free legislators restrained only by an accused's ability to prove impermissible motivation.

In a more cynical vein, the government's brief asserts that reversal of Petitioner's conviction would not further the intended goals because it would "be unlikely to deter" executive branch agents from conducting such investigations in the future, not for the purpose of instituting prosecutions, but for the purpose of collecting "information of lawful but embarrassing acts or statements by members of Congress." (At 16) Petitioner finds it difficult to believe that the Solicitor General seriously means to contend that the FBI and other federal law-enforcement agencies would defy a holding of this Court that such investigative

techniques violate the United States Constitution.*

2. In an effort to minimize the impact its proposed legal standard would have on our "framework of ordered liberty," Respondent carefully shades the facts of ABSCAM as they relate to Frank Thompson. This task is made easier by Respondent's decision to file a single brief covering all of the pending ABSCAM petitions in which it blurs the distinction among individual cases with blanket assertions, such as one from the District Court opinion (unsupported in the record as to Frank Thompson) that each of the defendants "was a willing volunteer seeking il-

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* Petitioner finds incomprehensible the government's further statement that "the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct." (At 16) Petitioner has not questioned the right of the executive branch to investigate and prosecute members of Congress where there is "legitimate reason" to do so.

legal and corrupt payments." (At 19) Again treating all of the ABSCAM prosecutions as fungible, Respondent incorrectly claims that its agents only videotaped "meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it." (At 17) Whatever the record may show as to the advance knowledge and motivation of other defendants, the uncontradicted record in the Thompson case shows that he was enticed to meet with the phony Sheik's agents for the unquestionably legitimate Congressional purpose of bringing job-producing investments to his economically depressed district. As to Respondent's assertion (at 7) that Thompson had "agreed to cooperate" in advance of the October 9 meeting at the Georgetown townhouse, what the record in fact shows is (1) that

Criden had falsely told Weinberg prior to ever meeting Thompson that he had Thompson "all lined up" (see Petition at 6), and (2) that Thompson had, at the request of a constituent named Silvestri, agreed to a meeting, duly noted on his Congressional office calendar, "in regard to some Arabs in the United States loaning money to Americans." Id. at 5.

When Respondents' effort to tar all the defendants with the same brush comes into direct collision with Thompson's videotaped refusal of offered payments, it turns that

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* Like Pontius Pilate, the government washes its hands of responsibility for dragging Frank Thompson into the ABSCAM net with the claim that "the government had no role whatsoever" in his selection. (At 15-16) Whatever may be the Court's ultimate determination as to government responsibility for the conduct of the unwitting agents unleashed by its own "creative activity," the issue is one with serious consequences for constitutional government and is one which warrants the plenary consideration of the Court. See Note, Entrapment Through Unsuspecting Middlemen, 95 Harv. L. Rev. 1122 (1982).

very distinction into evidence of Thompson's "crafty behavior," which Respondent offers as further evidence "that such schemes are not uncommon."*

3. The distorted portrayal of the facts as they relate to Frank Thompson (Point 2, supra) helps Respondent to obfuscate the significance of Petitioner's Brady claim. It must be remembered that the only adverse testimony against Thompson, to offset his videotaped rejection of payments, came from Ellis Cook, an immunized witness who could offer only hearsay testimony of what his mentor Howard Criden told him of his alleged

* This purportedly widespread legislative corruption, coupled with the alleged difficulty of uncovering it, is then used as justification for the claim of extraordinary investigative authority to ferret it out. (At 19) As to the claimed difficulty of prosecuting congressional corruption, Petitioner set forth in his Reply Brief in the Court of Appeals 40 instances, since 1943, in which members of Congress had been prosecuted for various acts of actual corruption without the aid of "sting" operations. (Reply Brief for Appellant Frank Thompson, Jr., at 5-13).

arrangement with Thompson, and Congressman John Murtha. Despite specific demands from defense counsel for any information "suggesting any promises or indications of immunity, leniency, decisions not to prosecute or favorable treatment to ... John Murtha," the prosecution made no pretrial disclosures. On cross-examination, Murtha repeatedly denied any "deals." When, at the close of trial, the prosecutor was willing only to stipulate that the government has "no present intention of prosecuting Congressman Murtha," Thompson's counsel took what he could get and told the court that the stipulation was "fully acceptable on behalf of Mr. Thompson."

Contrary to Respondent's brief, the story does not end there. Deputy Assistant Attorney General Irvin Nathan, who had been in the Courtroom during the aforementioned colloquy, testified at the post trial due process hearings that "a decision was made

not to indict Congressman Murtha" at the same time "a decision was made to indict Congressmen Thompson and Murphy." Nathan "participated in that decision-making process." (DP Tr. at 608) This decision was communicated both to Murtha's counsel, and to the House Ethics Committee. Nathan was aware that Murtha was a member of the House Ethics Committee. For the government to maintain at this late date that "no immunity /was/ granted to Congressman Murtha" (at 26), borders on the irresponsible, a transparent effort to avoid the deserved consequences of Brady.

4. In defending the court's instruction as to Frank Thompson's credibility as a witness -- an obviously important concern in light of the 3 days of jury deliberations -- Respondent implies that Petitioner objects to a "single instruction ... judged in artificial isolation" which was "immediately balanced" by other statements. (At 31)

This is simply not the case, as a review of the Petition will clearly demonstrate. The court's progressively harsher language in reference to Thompson's "motive to lie" contrasted sharply with the charge as to other witnesses.

Respondent's brief further suggests that the Petition may have manipulated the case law. This is manifestly incorrect.

Petitioner relied on Hicks v. United States, 150 U.S. 442. There the trial judge charged the jury that it must consider the defendant's interest in the case, which might cause him to make statements "that would not be governed by the truth," that the defendant "might be led away from the truth" because of his interest in the case. 150 U.S. at 451. This Court held that this charge was reversible error. In a fanciful reading of Hicks, Respondent says that the Hicks Court "strongly suggested that an instruction pointing out that a defendant

who testified had a motive to lie would not be sufficient to warrant the reversal of a conviction." (At 31) The Court in Hicks said no such thing. Rather, it said:

> It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person.
>
> 150 U.S. at 452

This suggestion was immediately qualified by the following warning, quoted in the Petition (at 60) that the right of an accused to testify in his own behalf

> would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability.
>
> Id. at 452

Our petition then discussed Reagan v.

United States, 157 U.S. 301 (1895). There the judge charged the jury as a general proposition that it "should look at the interest which the respective witnesses have in the suit or in its result" because where the witness has a direct personal interest, "the temptation is strong to color, pervert, or withhold the facts." Then becoming specific, the Judge charged:

> The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.
>
> 157 U.S. at 304

The Court held that this charge was not reversible error, because: "There is no declaration or intimation that the defendant has been untruthful in his testimony." 157 U.S. at 311. The Court contrasted the

situation in Hicks, where "an instruction as to the effect of a conflict between the testimony of defendant and other witnesses was condenmed, because of the assumption in it that the other witnesses were 'telling' the truth." 157 U.S. at 309.

Here, as in Hicks, we have an instruction or intimation that the defendant (Thompson) "has been untruthful in his testimony." Here, as in Hicks, we have an instruction that assumes "the other witnesses were 'telling the truth.'"* Here, as held in Hicks and emphasized in Reagan, the trial court cannot charge "directly or indirectly" that the "defendant is to be disbelieved because he is a defendant," for "that would practically take away the benefit which the law grants when it gives him the privilege

* As to "accomplices, informers and immunized witnesses," the jury was told the government must "take the witnesses to a transaction as they are" and merely cautioned this jury "to be careful in reviewing that testimony and weigh it with care."

of being a witness." Reagan v. United States, supra, 157 U.S. at 310.

5. Since submission of the Petition for Certiorari, the Court of Appeals for the District of Columbia has decided yet another ABSCAM case, United States v. Kelly, No. 82-1660, decided May 10, 1983. Although unanimously reinstating the conviction of Congressman Kelly, the two concurring opinions mirror the sharp division within the federal judiciary over the ABSCAM techniques.

Judge MacKinnon was alone when he wrote in Part III(B) of his opinion that "ABSCAM was not significantly different from an undercover drug or fencing operation offering to buy from all who appear at its door,"*

* The most compelling response to Judge MacKinnon's assertion appears in a provocative analysis of ABSCAM by a prominent New York attorney, Milton S. Gould, in May 17, 1983 New York Law Journal:

> Unlike the war on the drug traffic, projects like ABSCAM derive from no cognizable social needs: they arise out of the imagination and amibition of govern-

and he was alone in Part III(C) when he rejected the defendant's specific claims of "outrageous" government conduct.

Neither Judge Ginsburg nor Judge Robinson concurred with Judge MacKinnon's conclusions. Rather, they shared the District Court's "grave concern" that the ABSCAM drama unfolded as an "unwholesome spectacle." (Slip opinion of Judge Ginsburg at 7). The Majority of the panel concurred in the per curiam judgment because:

> Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority.
>
> Id. at 5

Thus, in effect, the majority members of the

Footnote continued

> employees, civil servants, who can command the services of informers out of a casting reservoir provided by the penitentiaries. (Gould, "The Art of Delation - Informers and Abscam Lessons.")

Kelly panel seemed to be associating themselves with Petitioner in urging this Court to provide that elaboration and thereby give guidance to those who must administer and apply the law and to those on the bench who, above all, must guard us from our guardians.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK THOMPSON, JR.,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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IN THE
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OCTOBER TERM, 1982

FRANK THOMPSON, JR.
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

The American Civil Liberties Union respectfully moves for leave to file the annexed brief amicus curiae in support of petitioner's application for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of

fundamental liberties guaranteed by the Constitution. One of the basic guarantees of our Constitution assures Americans that they will not be the target of intrusive governmental investigative techniques in the absence of particularized information, subject to effective verification by an independent authority, tending to suggest that the target of the investigation is involved in, or possesses information concerning, a violation of law. When the investigative techniques in question are the traditional ones of search, seizure or arrest, this Court has painstakingly evolved a legal structure designed to shield Americans from arbitrary fishing expeditions based upon subjective considerations which do not rise above the level of hunch. E.g. Delaware v. Prouse,

440 U.S. 648 (1979); Brinegar v. United States, 338 U.S. 160 (1949); Payton v. New York, 445 U.S. 573 (1980). In such traditional contexts, the government must, generally, obtain a warrant from a neutral magistrate upon a showing of probable cause before initiating the intrusive investigative technique. Even in the less structured context of investigative street stops, this Court has required an investigating officer to demonstrate an "articulable suspicion" and not a mere hunch, as a pre-condition to conducting intrusive investigative activity. E.g. Terry v. Ohio, 392 U.S. 1 (1968).

This petition arises out of a non-traditional investigative technique -- the Abscam investigation, pursuant to which selected members of Congress were encouraged by a government informant

and corrupt middlemen to commit an unlawful act while being videotaped by the FBI at a pre-selected location. While the Abscam technique is non-traditional, it is clearly as intrusive as a garden variety search which would have required a warrant and probable cause; and far more intrusive than a street stop which would have required a demonstration of articulable suspicion. In contrast with those more traditional forms of investigation, the Abscam technique is subject to no effective restraints whatever. No effective mechanism existed to assist in selecting the targets; no effective controls existed on the conduct of the investigation. In a very real sense, the investigation, with its extraordinarily intrusive techniques verging on entrapment and its sensitive separation

of powers overtones, unrolled on the basis of the hunches and improvisations of totally unrealiable government informants, corrupt middlemen and the lower echelon law enforcement personnel who work with them. Putting aside the serious separation of powers and entrapment issues raised by the Abscam investigation, it seems clear that if non-traditional investigative techniques such as those used in Abscam are to supplement the traditional law enforcement arsenal, this Court should consider the extent to which the Fourth Amendment and the Due Process Clause require a degree of procedural protection surrounding their use. Specifically, at least the following questions require resolution by this Court:

1) What substantive standard should be met before a law enforcement agency may utilize techniques similar to those used in Abscam in the investigation and detection of crime?

2) What procedures should be required in order to authorize intrusive investigative techniques similar to those used in Abscam?

3) What standards and procedures should exist in connection with the targeting of a specific individual or group for intrusive investigative techniques similar to those used in Abscam?

The current state of the law fails to provide adequate guidance to conscientious law enforcement officials and, because of its lack of precision, virtually invites abuse. Indeed, the conduct of the Abscam investigation itself demonstrates that hunch and subjectivity dominated the process. Accordingly, the American Civil Liberties

Union respectfully moves for leave to file a brief amicus curiae in support of petitioner's application for a writ of certiorari in the hope that the Court will utilize this opportunity to establish badly needed guidelines governing the use of newly evolved investigative techniques similar to those used against the petitioner.

Respectfully submitted,

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February 9, 1983

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INTRUSIVE INVESTIGATIVE TECHNIQUES SIMILAR TO THOSE USED IN THE ABSCAM INVESTIGATION MAY NOT BE UTILIZED IN THE ABSENCE OF:

A. Facts or Circumstances Which Reasonably Indicate That the Investigation Will Detect Criminal Activity That is Occurring or Likely To Occur in The Absence of the Investigation;

B. Reliable Facts or Circumstances Indicating That a Specific Target is Engaging, Has Engaged, or is Likely To Engage in the Illegal Activity in Question; and

C. A Determination By An Independent Authority, Preferably a Neutral Magistrate, That the Prerequisites Set Forth in (A) and (B) Exist.

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INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the foregoing motion.

STATEMENT OF THE CASE

The petitioner is a former member of Congress who was convicted of bribery (18 U.S.C. § 201 (a)) and conflict of interest (18 U.S.C. § 203 (a)) arising out of the Abscam investigation. The Abscam investigation evolved in three phases. Its initial phase involved a traditional "sting" operation designed to apprehend persons dealing in stolen or contraband property. See generally, Sections III and IV, Report to the Select Committee to Study Law Enforcement Undercover Activities of the Review By Its Counsel of the Confidential Abscam Files of the F.B.I., pp.5-12, August 18 1982.

The principal F.B.I. informant, Mel Weinberg, and local bureau agents escalated the investigation in the fall of 1978 into a general investigation into political corruption in New Jersey. Ibid, p.7; Testimony of William Webster, F.B.I. Undercover Guidelines: Oversight Hearings Before Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97 Cong., 1st. Sess. (G.P.O. Serial No. 18), April 20, 1982, p.20. Finally, in January, 1980, the investigation broadened into a general investigation into Congressional corruption. Ibid, p.11. See also, Webster, Ibid, p.23.

At the initial "sting" level, little or no danger of abuse existed, since the illegal activity was narrowly defined and the targeted parties involved were self-selecting. However, when the

investigation moved to the area of political corruption in New Jersey and, eventually, in the United States Congress, serious issues are raised as to whether a sufficient factual predicate existed to warrant the expanded investigation in general and the choice of specific targets in particular. The decision to zero in on political corruption, first, in New Jersey, and later, in the Congress may or may not have been based on more than hunch and rumor. Certainly, however, the choice of specific targets was seriously flawed, since the principal decisions as to specific targets were made by corrupt middlemen and an unreliable F.B.I. informant. The net effect of the laxness in

selecting specific targets was the improper involvement of innocent persons, such as Senator Pressler and Congressman Hughes, in the investigation. Indeed, it appears that the principal, if not the only control on the choice of specific targets was the F.B.I.'s reliance on the self-interest of corrupt middlemen to produce equally corrupt members of Congress. See, e.g. Senate Select Committee to Study Law Enforcement Undercover Activities, pp.118-120 (Testimony of Irvin B. Nathan); pp. 27-28 (Testimony of Michael Wilson). See generally, Section X, The Use of Unwitting Middlemen as a Technique for Identifying Suspects and Establishing Reasonable Suspicion in Report to the Select Senate Committee By Its Counsel, pp.28-34.

Thus, whatever the merits of the Abscam technique as a means of investigating consensual crime, it seems clear that no effective mechanisms existed to determine whether a sufficiently high probability of criminal activity existed -- either as a general matter, or with reference to specific targets -- to justify its use.

REASONS FOR GRANTING THE WRIT

Although the Court has evolved an elaborate structure to protect individual liberty in the context of searches (including wiretapping), seizures, arrests and street stops, it has provided virtually no guidance in the areas of less traditional investigative techiques, such as the use of undercover agents and pretext crimes. E.g. United States v. White, 401 U.S. 545 (1971); Hoffa v. United States,

385 U.S. 293 (1966); On Lee v. United States, 383 U.S. 747 (1951); Lopez v. United States, 373 U.S. 427 (1963), Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973). The net result has been the growth of a highly intrusive investigative technique with virtually no controls on its use. In the Abscam case, the technique involved, not only the use of undercover agents and pretext crimes, but the sound and video recording of targets. When, amicus submits, an investigative technique achieves such a level of intrusiveness, this Court should not ignore the capacity of abuse latent in its misuse. Law enforcement personnel at every level now have carte blanche to engage in intrusive undercover activity reaching the verge of entrapment with no judicial controls.

This Court should grant the petitions for certiorari arising out of the Abscam convictions and enunciate the necessary substantive and procedural rules to permit innovative law enforcement activity to flourish without endangering basic Fourth Amendment values.

In fact, such rules are relatively uncomplicated and generally accepted. First, the Court should recognize that the Fourth Amendment and the Due Process Clause impose a degree of restraint on the use of intrusive investigative techniques. Second, the Court should reiterate that such techniques cannot be used in the absence of facts or circumstances which reasonably indicate that they will detect criminal activity which is occurring or is likely to occur in the absence of the investigation. Third, the Court

should admonish that such techniques cannot be used against a specific target in the absence of particularized information linking the target to criminal activity. Finally, the Court should insist upon a procedural mechanism to assure that substantive standards governing the use of such techniques are being respected

Such a set of Fourth Amendment guidelines would impose no restrictions on legitimate law enforcement activity, while providing badly needed protection against arbitrary or bad faith investigations. Amsterdam, Perspectives on the Fourth Amendment, 58 U. Minn. L.Rev. 349, 406-09 (1974).

CONCLUSION

The petition for certiorari should be granted.

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